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No. 01-

IN THE

Supreme Court of the United States

NORCAL WASTE SYSTEMS, INC. and NORCAL WASTE SYSTEMS, INC. EMPLOYEE STOCK OWNERSHIP PLAN AND TRUST,

Petitioners,

v.

JULIO ABRAHAM, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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64pp

QUESTIONS PRESENTED

1. Can state law impose on ERISA-regulated plan administrators fiduciary duties governing their management and investment decisions that are different from or additional to the fiduciary duties imposed by ERISA?

2. Does ERISA completely preempt a state law claim for breach of fiduciary duty, brought against an ERISA fiduciary by a participant in an ERISA-regulated plan, complaining of management and investment decisions made by that fiduciary?

PARTIES TO THE PROCEEDING

1. Norcal Waste Systems, Inc. and the Norcal Waste Systems, Inc. Employee Stock Ownership Plan and Trust are the Petitioners herein and were originally Defendants (and later, Intervenors) below.

2. Bank of America is being served as a Respondent herein (and is filing its own petition for a writ of *certiorari*) and was originally a Defendant (and later a Cross-Defendant and a Cross-Claimant in Intervention) below.

3. Julio Abraham, *et al.* are Respondents herein and were the Plaintiffs below. The 146 Plaintiff-Respondents not set forth in the caption are listed in the Appendix at pages 26a–27a.

RULE 29.6 DISCLOSURE

Petitioner Norcal Waste Systems, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
RULE 29.6 DISCLOSURE	ii
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
INTRODUCTION	2
STATEMENT OF THE CASE	5
A. Statutory Framework.	5
B. Statement Of Facts.	7
C. Proceedings Below.	9
REASONS FOR GRANTING THE PETITION	12
A. ERISA Completely Preempted The ESOP Participants' State Law Claim For Breach Of Fiduciary Duty.	12
B. The Ninth And Fifth Circuits' Preemption Holdings Conflict With Those Of Five Other Circuits.	19

TABLE OF CONTENTS

		Page
1.	In The Sixth And Third Circuits, ERISA Preempts Any State Law Claim Concerning An ERISA Plan Between Parties In An ERISA-Regulated Relationship.	20
2.	The Second Circuit Has Rejected The "Dual Capacity" Analysis Used By The Ninth Circuit, Holding That ERISA Preempts Claims Based On Contractual Relationships Existing Before The ERISA Relationship.	22
3.	The Seventh And Eighth Circuits Have Held Preempted State Law Claims By ERISA Plan Participants Against Plan Administrators Based On Assertedly Parallel State Law Relationships.	23
C.	The Ninth Circuit's Opinion Undermines A Core Purpose Of ERISA By Making Unclear The Duties And Potential Liability Of Those Who Manage The Assets Of Hundreds of Thousands Of Pension Plans.	25
CONCLUSION		26

TABLE OF AUTHORITIES

	Page
Cases	
Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981)	5
Bartholet v. Reishauer A.G. (Zurich), 953 F.2d 1073 (7th Cir. 1992)	23
Bast v. Prudential Ins. Co. of Am., 150 F.3d 1003 (9th Cir. 1998)	15
Boggs v. Boggs, 520 U.S. 833 (1997)	2
Cal. Div. of Labor Stds. Enforcement v. Dillingham Constr., N.A., 519 U.S. 316 (1997)	2, 17
De Buono v. NYSA-ILA Med. & Clin. Servs. Fund, 520 U.S. 806 (1997)	2, 17
Egelhoff v. Egelhoff ex rel. Breiner, 532 U.S. 141 (2001)	2
General American Life Insurance Co. v. Castonguay, 984 F.2d 1518 (9th Cir. 1993)	17, 18, 19
Glaziers & Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Sec., Inc., 93 F.3d 1171 (3rd Cir. 1996)	19, 21
Hull v. Fallon, 188 F.3d 939 (8th Cir. 1999), *cert. denied*, 528 U.S. 1189 (2000)	19, 23, 24
Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990)	5, 6

TABLE OF AUTHORITIES

Page

Jass v. Prudential Health Care Plan, Inc., 88 F.3d 1482 (7th Cir. 1996) 19, 23, 24

Martin v. Feilen, 965 F.2d 660 (8th Cir. 1992) 16

Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 62–64 (1987) 7

Moench v. Robertson, 62 F.3d 553 (3rd Cir. 1995) 6

N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995) 2, 3, 6, 17, 22, 26

Pegram v. Herdrich, 530 U.S. 211 (2000) 3, 13, 14

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) 5

Rutledge v. Seyfarth, Shaw, Fairweather & Geraldson, 201 F.3d 1212 (9th Cir.), *amended by* 208 F.3d 1170 (9th Cir.), *cert. denied*, 531 U.S. 992 (2000) 7, 15

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) 17

Smith v. Dunham-Bush, Inc., 959 F.2d 6 (2d Cir. 1992) 19, 22, 23

Smith v. Provident Bank, 170 F.3d 609 (6th Cir. 1999) 19, 20, 21

Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters., Inc., 793 F.2d 1456 (5th Cir. 1986) 12, 19

TABLE OF AUTHORITIES

	Page
Toumajian v. Frailey, 135 F.3d 648 (9th Cir. 1998)	7, 17
UNUM Life Ins. Co. of Am. v. Ward, 526 U.S. 358 (1999)	2
Varity Corp. v. Howe, 516 U.S. 489 (1996)	6, 15

Statutes

28 U.S.C.	
§1254(1)	1
§1367	7
29 U.S.C.	
§1001(a)	5
§1001(b)	6
§1002(2)	8
§1002(21)(A)	6
§§1021–31	5
§§1051–61	5
§§1081–86	5
§§1101–14	5, 25
§1104	8, 10
§1104(a)(1)	13
§1104(a)(1)(B)	6
§1107(d)(6)(A)	5
§1109(a)	1, 6
§§1131–47	5
§1132(a)	1, 7
§1132(a)(2)	6
§1132(a)(3)	6
§1132(e)(1)	25
§1144(a)	1, 7
ERISA	
§2(a)	5

TABLE OF AUTHORITIES

	Page
§2(b)	6
§3(2)	8
§3(21)(A)	6
§§101–111	5
§§201–211	5
§§301–308	5
§§401–414	5, 25
§404	8, 10
§404(a)(1)	13
§404(a)(1)(B)	6
§407(d)(6)(A)	5
§409(a)	1, 6
§§501–517	5
§502	14
§502(a)	1, 7
§502(a)(2)	6, 14, 15
§502(a)(3)	6, 14, 15
§502(e)(1)	25
§514(a)	1, 7
29 C.F.R. §2509.94–2(1)	16

Other Authorities

H.R. COMM. ON EDUCATION & LABOR, H.R. REP. No. 93–533 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639	5, 16
H.R. CONF. REP. No. 93–1280 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038	17
Http://www.the–esop–emplowner.org/pubs/stats.html (visited Feb. 8, 2002)	25
Robert N. Eccles, "Fiduciary Litigation Under ERISA," in *ERISA Fiduciary Law* 400	

TABLE OF AUTHORITIES

Page

(Susan P. Serota ed., 1995) 14, 15

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals, entered on September 7, 2001 and reported at 265 F.3d 811, appears in the Appendix at pages 1a–20a. A transcript of the District Court's unreported oral ruling denying Plaintiffs' motion to remand appears at pages 21a–22a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its opinion on September 7, 2001. App. 1a. The Court denied Petitioners' timely petition for rehearing and suggestion of rehearing *en banc* on November 14, 2001. App. 23a–24a. Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

This case concerns Sections 409(a), 502(a) and 514(a) of ERISA, 29 U.S.C. §§1109(a), 1132(a), 1144(a), which are reproduced in the Appendix at page 25a. *See generally* Employee Retirement Income Security Act of 1974 ("ERISA"), 88 Stat. 832, as amended, 29 U.S.C. §§1001 *et seq.*

INTRODUCTION

This case presents a question of great significance to ERISA fiduciaries and the plans they administer: when investing or managing a plan's assets pursuant to ERISA fiduciary standards, can ERISA fiduciaries simultaneously be subject to different or additional fiduciary duties under state law? The Ninth Circuit has now held that they can, and that ERISA-protected plan participants thus can sue ERISA-regulated fiduciaries under state law for those fiduciaries' investment and management decisions, simply by alleging that those decisions breached fiduciary duties arising from a non-ERISA relationship between the parties such as, in this case, an "independent creditor relationship" arising under state law.

In so holding, the Ninth Circuit has ignored a fundamental tenet of this Court's ERISA preemption jurisprudence and created a conflict with decisions of five other Circuits. This conflict renders unclear the legal duties and potential liabilities of the fiduciaries who manage the more than 700,000 private pension plans in America, and merits review by this Court.

Given ERISA's importance to the nation's economy and workers (*Boggs v. Boggs*, 520 U.S. 833, 839 (1997)) and the "unhelpful text" of its preemption clause (*N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995) ("*Travelers*")), this Court has reviewed 18 ERISA-preemption cases in the past two decades.[1] Despite this body of law, the issue here is the subject of a substantial disagreement between the Courts of Appeals. This case presents an important opportunity to resolve that

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[1] *See Cal. Div. of Labor Stds. Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316, 334 n.1 (1997) (Scalia, J., concurring) (listing 13 prior cases); *see also Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141 (2001); *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358 (1999); *Boggs v. Boggs*, 520 U.S. 833 (1997); *De Buono v. NYSA-ILA Med. & Clin. Servs. Fund*, 520 U.S. 806 (1997).

conflict and establish a clear, simple rule to guide lower courts in adjudicating disputes about the core of ERISA's exclusive domain. That is because, unlike most ERISA preemption cases that reach this Court, this one does not concern the myriad state laws that in some way merely "relate to" health care or other services paid for by employee welfare benefit plans. Rather, it implicates a central purpose of ERISA, and of its preemption and civil enforcement provisions in particular: to create uniform, exclusive federal standards of fiduciary responsibility for those who manage and direct the investments of employee retirement plans. *See Travelers*, 514 U.S. at 657 (Congress "intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation . . ." (quotation omitted)); *see also Pegram v. Herdrich*, 530 U.S. 211, 235 (2000) (ERISA fiduciaries must act with "an eye single" to interests of plan participants and beneficiaries (quotation omitted)). The Ninth Circuit's new rule, together with the Fifth Circuit opinion on which it relies, conflicts with decisions of five other Circuits and imperils that vital statutory objective.

The facts of this case illustrate the importance of the issue presented for those who manage ERISA plans. In 1986, an employee stock ownership plan sponsored by Norcal Solid Waste Systems, Inc. (the "Norcal ESOP") had acquired all the stock of Norcal from the company's employee-owners in exchange for cash and promissory notes issued by the ESOP; many of those noteholders were ESOP participants. In 1987, the ESOP's Administrative Committee was faced with an important question: should the Committee authorize a merger of the Norcal ESOP with an ESOP that owned all the stock in Norcal's local competitor (followed by a merger of Norcal and the competitor)?

The decision implicated competing concerns. On the one hand, the merger would increase the long-term value of the stock owned by the Norcal ESOP by preventing the impending acquisition of Norcal's competitor by a large national

company that, upon gaining a foothold in the local market, could drive Norcal out of business. On the other hand, the merger would significantly increase the Norcal ESOP's (and Norcal's) short-term debt, which could, among other things, potentially impair the ESOP's ability to make payments on the ESOP notes.

In making that decision, what standard(s) define the Committee's fiduciary duties? The significant fiduciary duties that the Committee owes the ESOP and its participants under ERISA require it to approve proposed transactions that it believes are in *their* best interests. But what if (as Plaintiffs alleged here) the transactions are *not* also in the best interests of the *holders of the ESOP notes*? Do the Committee's fiduciary duties differ as to the subset of ESOP participants who are noteholders, and whose relative preferences for short-term risk and long-term reward thus may differ from those of the other ESOP participants? Can state law impose upon the Committee different or additional fiduciary duties with respect to the investment-management decision it is called upon to make—in this case, a duty to *reject* transactions that the fiduciary duties imposed by ERISA would otherwise obligate it to *approve*? Under the opinion below, when making its decision, the Committee must consider *both* its ERISA-imposed fiduciary duties *and* the potentially conflicting fiduciary duties imposed by state law.

That framework of dual fiduciary duties and laws now applied in the Fifth and Ninth Circuits imposes unfair burdens on ERISA fiduciaries and conflicts with opinions in the Second, Third, Sixth, Seventh and Eighth Circuits. Those five Circuits have held that if an act by an ERISA fiduciary is subject to ERISA, the act cannot also be subject to state law: ERISA will preempt any claim for breach of a state law duty that might otherwise apply to that same act. And in one of those Circuits, ERISA so thoroughly occupies the field of fiduciary duties regarding plans as to preempt state law claims for breach of fiduciary duty even against parties who are *not* fiduciaries under ERISA. This conflict has important

consequences for hundreds of thousands of ERISA fiduciaries and the plans they administer, and merits review by this Court.

STATEMENT OF THE CASE

A. Statutory Framework.

In 1974, after a decade of studies of America's private pension system, Congress enacted ERISA, a "massive undertaking" (*Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 44 (1987)) whose "primary purpose . . . is the protection of individual pension rights." H.R. COMM. ON EDUCATION & LABOR, H.R. REP. No. 93–533 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4639; *see also* ERISA §2(a), 29 U.S.C. §1001(a) (stating intent to provide "minimum standards . . . assuring the equitable character of [employee benefit] plans and their financial soundness").

ERISA governs, among other things, reporting and disclosure of plan information (§§101–111, 29 U.S.C. §§1021–31), participation limits and vesting (§§201–211, 29 U.S.C. §§1051–61), plan funding (§§301–308, 29 U.S.C. §§1081–86), fiduciary duties (§§401–414, 29 U.S.C. §§1101–14), and administration and enforcement (§§501–517, 29 U.S.C. §§1131–47). An employee stock ownership plan, or ESOP, is a type of ERISA-regulated employee pension benefit plan "designed to invest primarily in qualifying employer securities." §407(d)(6)(A), 29 U.S.C. §1107(d)(6)(A).

Among its "'essential tools,'" ERISA includes a "'carefully integrated' civil enforcement scheme" meant to afford "the exclusive remedy for rights guaranteed under ERISA" (*Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137, 144 (1990) (quoting *Pilot Life Ins.*, 481 U.S. at 54, 52) and a "deliberately expansive" preemption clause "designed to 'establish pension plan regulation as exclusively a federal concern.'" *Pilot Life*, 481 U.S. at 46 (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981)). Congress intended those provisions

> to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government . . . , [and to prevent] the potential for conflict in substantive law . . . requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction. (*Travelers*, 514 U.S. at 656–57 (quoting *Ingersoll-Rand*, 498 U.S. at 142))

Fiduciary responsibility is a key area in which Congress pursued its goals of employee protection and legal uniformity. It did so "by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." §2(b), 29 U.S.C. §1001(b).

After defining who is a plan fiduciary in broad, functional terms (§3(21)(A), 29 U.S.C. §1002(21)(A)), ERISA prescribes strict standards of loyalty and care for those fiduciaries, requiring them to act "*solely* in the interest of [a plan's] participants and beneficiaries" and with "care, skill, prudence, and diligence." §404(a)(1)(B), 29 U.S.C. §1104(a)(1)(B) (emphasis added). With a few exceptions, ESOP fiduciaries have the same duties as other ERISA fiduciaries. *See Moench v. Robertson*, 62 F.3d 553, 569 (3rd Cir. 1995).

If a fiduciary breaches those duties, ERISA's civil-enforcement scheme authorizes a plan participant, *inter alia*, to bring a civil action "for appropriate relief" (§502(a)(2), 29 U.S.C. §1132(a)(2)), including restoration to the plan of any loss or improper profit and other "equitable or remedial relief" (§409(a), 29 U.S.C. §1109(a)), or for individual equitable relief. *See Varity Corp. v. Howe*, 516 U.S. 489, 509–12 (1996) (discussing §502(a)(3), 29 U.S.C. §1132(a)(3)).

These remedies for a plan fiduciary's breach of duties are exclusive: ERISA's preemption clause "supersede[s] any and all State laws insofar as they . . . relate to any employee

benefit plan." §514(a), 29 U.S.C. §1144(a). Moreover, its civil-enforcement provisions (§502(a), 29 U.S.C. §1132(a)) *completely* preempt any purportedly state law–based claim that could be asserted under those provisions, requiring a court to "recharacterize" such a claim as actually "arising under federal law" and thus subject to removal. *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 62–64 (1987).

The doctrines of preemption and complete preemption describe two concentric circles: a broad outer ring of state law claims that merely "relate to" a plan and thus are subject to a preemption defense, and a narrower core of claims asserted to be based on state law that actually fall within ERISA's civil enforcement scheme and are therefore completely preempted. *See id.*; *Toumajian v. Frailey*, 135 F.3d 648, 654–55 (9th Cir. 1998). As the Ninth Circuit acknowledged, where ERISA completely preempts *any* state law-based claim asserted by some (though not necessarily all) of the plaintiffs against some (though not necessarily all) of the defendants, then the entire case is removable and the District Court may exercise supplemental jurisdiction over the other claims and parties if appropriate under 28 U.S.C. §1367. App. 6a–9a, citing *Rutledge v. Seyfarth, Shaw, Fairweather & Geraldson*, 201 F.3d 1212, 1215 (9th Cir.), *amended by* 208 F.3d 1170 (9th Cir.), *cert. denied*, 531 U.S. 992 (2000). Such was the case here.

B. Statement Of Facts.

In the 1920s, a group of Italian immigrants formed a cooperative to collect refuse in San Francisco neighborhoods. That cooperative was the predecessor of what ultimately became Norcal Waste Systems, Inc. ("Norcal"). 1 ER 1 ¶¶7, 38. From its inception through 1986, the company followed a tradition of strict employee ownership: only those who worked the company's routes (or their heirs) could acquire its stock. *Id.* ¶¶3, 12, 38.

As of 1986, current and former Norcal employees (and their heirs) still owned all of the company stock. *Id.* ¶¶3, 38. Because of the illiquidity of the stock and the age of most of the shareholders—most had retired or were close to retirement—Norcal created an employee stock ownership plan (the "Norcal ESOP") as the first stage in a plan to continue the tradition of employee ownership while allowing the shareholders to obtain immediate cash for their stock by selling it to the ESOP. *Id.* ¶13, 39–40. Upon the Norcal ESOP's formation, everyone then employed by Norcal became an ESOP participant. *Id.* at 57 ¶4.

The Norcal ESOP is an ERISA-regulated pension plan, managed by an Administrative Committee (the "ESOP Committee") appointed by Norcal's Board of Directors. §3(2), 29 U.S.C. §1002(2); 1 ER 1 ¶36. The ESOP Committee's members owe fiduciary duties under ERISA to all ESOP participants. *See* §404, 29 U.S.C. §1104.

In December 1986, the ESOP Committee approved the ESOP's purchase of all of the Norcal stock from the current or former Norcal employees for a combination of cash and non-recourse subordinated notes (the "Notes") issued by the ESOP (the "Acquisition"). 1 ER 1 ¶3, 46–47, 55. Norcal borrowed money and loaned it to the ESOP for the cash payment. *Id.* ¶41–44. The ESOP was to make quarterly payments on the Notes using dividends from and contributions by Norcal. *Id.* ¶¶47, 62. After the Acquisition, the ESOP owned all of the shares of Norcal.

A year later, in 1987, the ESOP Committee members voted to merge the Norcal ESOP with the ESOP of Norcal's local competitor, Envirocal, Inc. (the "Envirocal ESOP Merger"). That merger, followed by a merger of the two companies, created a combined company owned by the Norcal ESOP, thereby averting Envirocal's impending acquisition by a national conglomerate that, upon gaining access to the local market, could drive Norcal out of business. *Id.* ¶¶56, 58.

Three years later, in 1990, the ESOP Committee voted to merge the Norcal ESOP with an ESOP that owned all the shares of Excel Environmental Inc. (the "Excel ESOP Merger"), which resulted in the Norcal ESOP owning Excel. *Id.* ¶59. Norcal and the Norcal ESOP took on additional debt in the two merger transactions. *Id.* ¶¶56, 59.

The ESOP defaulted on the Notes in April 1991, and this litigation followed. *Id.* ¶¶61–62.

C. Proceedings Below.

Plaintiffs are 147 of the shareholders who sold their Norcal stock to the Norcal ESOP in the 1986 Acquisition and held ESOP notes. *Id.* ¶3, 11. At the time of the Acquisition, forty-four of the Plaintiffs were still employed by Norcal and thus were plan participants (the "ESOP Participants"). *Id.* at 64 ¶¶3, 20. Plaintiffs filed this action in California state court. At the same time, the ESOP Participants filed a suit under ERISA in federal court against some of the same defendants sued in state court.

Both suits primarily challenged the Envirocal and Excel ESOP Mergers, alleging that in these transactions, Norcal incurred heavy debt that, in time, left it unable to provide the ESOP funds to make payments on the ESOP Notes. In the federal action, the ESOP Participants claimed that in connection with these transactions, the defendants (including members of the ESOP Committee) had breached ERISA fiduciary duties owed to them as plan participants. *Id.* at 57 ¶¶15–19. In the state court action, Plaintiffs claimed, *inter alia*, that in connection with these transactions, the defendants (including members of the ESOP Committee) had breached state law fiduciary duties owed to them as holders of the Notes.[2] *Id.* at 1 ¶¶98–101. In particular, Plaintiffs

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[2]In the proceedings below, Petitioners contended—and the District Court held—that ERISA also completely preempted two other claims (constructive fraud and negligence) premised on purported state law (continued . . .)

alleged that in approving these transactions, the ESOP Committee members breached "a fiduciary duty [owed] to plaintiffs as shareholders" under state law that "continued on after [the Acquisition]." *Id.* ¶98.

The ESOP Committee members owed the ESOP Participants fiduciary duties under ERISA (as the ESOP Participants admitted in their federal suit). *Id.* at 57 ¶¶8–9, 19. *See* §404, 29 U.S.C. §1104. Accordingly, believing that at least one of the state law duty–based claims asserted against the ERISA fiduciaries was completely preempted as to the ESOP Participant Plaintiffs, Petitioners removed the state case to federal court. 1 ER 64. The Removal Notice stressed that certain of the ESOP Committee members had been "sued solely as members of that Committee." *Id.* ¶6.

Plaintiffs filed a motion to remand, which the District Court denied. App. 21a–22a. The District Court held that ERISA preempts "common-law causes of action [that] could or would, directly or indirectly, interfere with the relationships that are re[gu]lated by ERISA; in essence, by creating duties on the part of ESOP defendants that could be potentially inconsistent with the duties imposed by ERISA." *Id.* at 22a.

Thereafter, the litigation continued for nearly five years.[3] After a three-week jury trial (*see* 5 ER 1136) and many dispositive rulings on motions, a final judgment was entered. 5

(. . . continued)
duties owed by the ESOP Committee to Plaintiffs. 1 ER 64 ¶¶12–13, 15–16. It is unnecessary to address those claims here because, as previously explained, the state case was removable if at least one claim was completely preempted. *See supra* at p.7. Because the state law breach of fiduciary duty claim conflicts most obviously with ERISA's fiduciary duty provisions, this Petition focuses on that claim and shows why ERISA preempted it.

[3]During that time, Norcal and the ESOP reached a settlement with Plaintiffs for over $36 million, which led to dispositive rulings—potentially nullified by the Ninth Circuit's decision—about the effect of the settlement and about Norcal's and the ESOP's asserted obligations to indemnify the remaining defendant, Bank of America.

ER 1111. Plaintiffs appealed (5 ER 1151), and defendant Bank of America cross-appealed (Nos. 99-17040, 99-17474).

In a published opinion, the Ninth Circuit held that the District Court had lacked jurisdiction, ordered the judgment vacated, and remanded the case with directions to remand to state court. App. 20a. After first noting the "confusion" and "differing analyses" of its efforts to define the limits of ERISA preemption (App. 10a), the Ninth Circuit concluded that this case satisfied neither of its prerequisites for ERISA complete preemption: (1) Section 514(a) did not afford a preemption defense to the state law claims, and (2) those claims could not be recharacterized as arising under Section 502(a) and thus completely preempted. App. 9a.

The court's conclusion rested on a theory that the ESOP Participants, along with the other Plaintiffs, were owed fiduciary duties in a "capacity" other than that of ESOP participant. App. 16a. The panel held that the ESOP Participants' state law claims arose from their "independent creditor relationship with the ESOP as a corporate entity based upon their status as former shareholders and current note holders" (*id.* at 13a)—not from their ERISA plan participant relationship with the ESOP—and that the ESOP Committee members were being sued "not . . . in their capacity as plan fiduciaries, but rather as the agents of the ESOP corporate entity that obtained Norcal shares from Plaintiff note holders." *Id.* at 16a. In analyzing these capacities, the panel held that "[s]tate law imposes duties upon [the ESOP Committee members] in that capacity [as corporate agents] only" (*id.*) and that the ERISA fiduciary duties owed to the plaintiffs who were ESOP participants are "parallel but independent to those owed to them as note holders." *Id.* at 15a. Based on this dual-capacity analysis, the panel concluded that the state law claims neither "relate to" the ESOP by encroaching on ERISA-regulated relationships (*id.* at 11a–17a), nor "fall within the scope of [ERISA] §1132(a) because those claims are based upon rights that arise under state law in their capacity as former shareholders of Norcal and current note

holders . . ., not upon any rights . . . conferred, enforced, or governed by ERISA." *Id.* at 18a.

The panel relied heavily on a Fifth Circuit case that employed a similar dual-capacity analysis: *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters., Inc.*, 793 F.2d 1456 (5th Cir. 1986) (discussed in App. 14a–15a). There, a profit-sharing trust that owned employer stock sued an individual who was both a fiduciary of the trust and a director of the employer, alleging that as a fiduciary he had breached his fiduciary duty under ERISA, and that as a corporate director he had breached his state law fiduciary duty to the trust as shareholder. *Sommers*, 793 F.2d at 1458. Calling those duties "parallel but independent," the Fifth Circuit held that the state law claim escaped preemption because it "[did] not affect relations between the ERISA fiduciary and the plan . . . as such; [but] affect[ed] them in their separate capacities as corporate director and shareholder." *Id.* at 1468. The court dismissed as "remote" the risk that, while the state law and ERISA duties were "independent" in the abstract, they would "nevertheless saddle the director/fiduciary with inconsistent or conflicting requirements." *Id.*

REASONS FOR GRANTING THE PETITION[4]

A. ERISA Completely Preempted The ESOP Participants' State Law Claim For Breach Of Fiduciary Duty.

The Ninth Circuit held that ERISA fiduciaries can simultaneously owe fiduciary duties under both ERISA *and* state law in the same transaction and, indeed, even to the same

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[4]Norcal and the Norcal ESOP also agree with Bank of America that the decision below merits review because, as explained in the Bank's separate petition, it conflicts with other Circuits' holdings regarding ERISA's preemption of state law claims challenging ESOP transactions exempted from ERISA's general prohibited transaction provisions.

ERISA-protected party. Plaintiffs thus can subject plan administrators' conduct to scrutiny for satisfaction *both* of ERISA fiduciary duties *and* of different or additional state law fiduciary duties. The Ninth Circuit's conclusion is incorrect (and, as we show in Section B below, contrary to decisions of five other Circuits).

A central purpose of ERISA's preemption clause and its civil enforcement provisions was to create uniform, exclusive federal standards of fiduciary responsibility for those who manage and direct the investments of employee retirement plans. *See supra* at pp.5–7 and authorities cited. ERISA requires fiduciaries to act with "an eye single" to beneficiaries' interests (*Pegram v. Herdrich*, 530 U.S. 211, 235 (2000) (quotation omitted)) and to discharge their duties "*solely* in the interest of the participants and beneficiaries," meaning "for the *exclusive* purpose of (i) providing benefits . . . and "(ii) defraying reasonable expenses." §404(a)(1), 29 U.S.C. §1104(a)(1) (emphases added).

But not all acts of a party who is for some purposes an ERISA fiduciary are fiduciary acts regulated by ERISA. As this Court recognized in *Pegram*, "[e]mployers, for example, can be ERISA fiduciaries and still take actions to the disadvantage of employee beneficiaries, when they act as employers (*e.g.*, firing a beneficiary for reasons unrelated to the ERISA plan), or even as plan sponsors (*e.g.*, modifying the terms of a plan [a nonfiduciary function] . . . to provide less generous benefits)." 530 U.S. at 225. Thus, ERISA allows a party to act as a fiduciary toward a plan's beneficiaries in some transactions and to act as a non-fiduciary, with divergent or even adverse interests, in others.

While recognizing that parties may perform *different acts* in different capacities, ERISA carefully avoids subjecting parties to different fiduciary duties under ERISA and under state law for the *same act*. It does so by requiring "that the fiduciary with two hats *wear only one at a time, and wear the fiduciary hat when making fiduciary decisions*." *Id.* (emphasis added). For any act of a fiduciary challenged in a

lawsuit, a court must determine whether that fiduciary was wearing its ERISA fiduciary hat or a different hat to which state law could apply; to do this, it must focus on the challenged act:

> In every case charging breach of ERISA fiduciary duty, then, the threshold question is not whether the actions of some person employed to provide services under a plan adversely affected a plan beneficiary's interest, but *whether that person was acting as a fiduciary* (that is, was performing a fiduciary function) *when taking the action subject to complaint.* (*Id.* at 226 (emphasis added))

The crucial point is this: what determines whether a claim affects a defendant in his or her capacity as an ERISA fiduciary is the nature of the challenged *act*, not whether the plaintiff *says* that it is suing the fiduciary in an ERISA capacity or in a state law capacity, and not whether plaintiff asserts its ERISA or state law rights (or, as here, *both*). If parties have an ERISA-regulated relationship, each *act* is either subject to ERISA fiduciary duties or to state law standards, but not both. If the act is subject to ERISA fiduciary duties, any otherwise relevant state law fiduciary duty is preempted; and a state law suit by a plan participant against an ERISA fiduciary challenging that act is completely preempted.[5] This is hornbook ERISA law. *See, e.g.*, Robert N.

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[5]While preemption and complete preemption are distinct concepts, and the Ninth Circuit briefly discussed the latter (App. at 17a–20a), its holding in fact rests entirely on its flawed "dual capacity" analysis of preemption (*id.* at 11a–17a). The Ninth Circuit acknowledged that ERISA authorized the ESOP Participants to sue the ESOP fiduciaries for breach of their ERISA fiduciary duties (as the ESOP Participants had in fact done in their federal suit). *Id.* at 18a. Accordingly, if their purportedly state law–based claim for breach of fiduciary duty *did* in fact "relate to" the ESOP, then the ESOP Participants could have brought that claim under ERISA if it was within the scope of one of the civil-enforcement provisions of Section 502.

Defendants cited two provisions under which the ESOP Participants' purportedly state law–based claim should be recharacterized as arising under ERISA: Sections 502(a)(2) and (a)(3). The Ninth Circuit's one-sentence analysis of Section 502(a)(3) merely recapitulated its "dual

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Eccles, "Fiduciary Litigation Under ERISA," in *ERISA Fiduciary Law* 400 (Susan P. Serota ed., 1995) ("Because ERISA exclusively supplies the standard by which fiduciary conduct is measured, any claims alleging a breach of fiduciary duty based on state law will be preempted").

In approving the ESOP mergers at issue, the ESOP Committee performed ERISA-regulated fiduciary acts. Indeed, in their federal court suit, the ESOP Participants themselves described those transactions as involving ERISA fiduciary acts. 1 ER 57 ¶19. That suit, like the state law breach of fiduciary duty claim, focused significantly on the Envirocal ESOP and Excel ESOP Mergers (*compare* 1 ER 1 ¶¶56–61 *with* 1 ER 57 ¶¶15–18)—a parallel recognized by the Ninth Circuit.[6] In those transactions, the ESOP

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capacity" preemption analysis (*see* App. 19a ("none of these Plaintiffs seek[s] relief as a participant . . . ." (internal quotation omitted)) and thus fails. Accordingly, removal was proper because Section 502(a)(3) completely preempted the claim, making analysis of Section 502(a)(2) unnecessary.

In any case, the Ninth Circuit also erred in rejecting complete preemption under Section 502(a)(2), on the ground that Plaintiffs sought relief on their own behalf, not on behalf of the plan, as subdivision (a)(2) requires. *Id.* (The court made no such claim about subdivision (a)(3), which allows participants to seek relief on their own behalf. *See Varity Corp. v. Howe*, 516 U.S. 489, 507–15 (1996)). But plan participants cannot avoid recharacterization under Section 502(a)(2) simply by suing on their own behalf. When Congress required that participants bring Section 502(a)(2) claims on behalf of a *plan*, while preempting any state law claim that "relates to" a plan, it made clear its intent that participants not be able to recover individually on such claims *at all*, not that they be able to do so under state law. *Cf. Rutledge v. Seyfarth, Shaw, Fairweather & Geraldson*, 201 F.3d 1212, 1222–23 n.13 (9th Cir.), *amended by* 208 F.3d 1170 (9th Cir.), *cert. denied*, 531 U.S. 992 (2000) (unavailability under ERISA of specific relief sought does not preclude complete preemption); *Bast v. Prudential Ins. Co. of Am.*, 150 F.3d 1003, 1010 (9th Cir. 1998) (similar, preemption) (citing opinions of three Circuits).

[6] *Compare* App. 6a (describing "alleged conduct underlying Plaintiffs' [state law] claims" as "a series of breaches, misrepresentations, omissions, concealment, and conflicts of interest by Defendants . . . *in conjunction with . . . the 1987 Envirocal transaction, and subsequent ESOP activities*") *with id.* (describing ESOP Participants' federal claims as (continued . . .)

Committee members exercised their discretion under ERISA to manage and invest ESOP assets.[7] In discharging their ERISA-imposed fiduciary responsibilities, they were required to approve transactions that they found to be in the best interests of the ESOP and its participants. *See supra* at p.6. But under the Ninth Circuit's decision, those ERISA fiduciaries, having approved such transactions, may be liable for breach of a *state law* fiduciary duty requiring them to refrain from any action that is not also in the best interests of the ESOP's *creditors*.

This is a paradigmatic example of what Congress intended ERISA's preemption clause to prohibit. Whatever effect the 1974 Congress intended ERISA's broad "relate to" preemption clause to have on state laws regulating health care and similar services, at a minimum it intended to exclude the imposition of competing state law fiduciary duties on those responsible for the core ERISA function of making investment decisions regarding retirement plans' assets.[8] Even the narrow early versions of ERISA's pre-

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based on a "breach of . . . duties imposed by ERISA *in conjunction with the 1987 Envirocal transaction and subsequent ESOP activities*") (all emphases added).

[7]The Ninth Circuit asserted that the state law claims "did not arise from transactions directly relating to plan benefits or administration." App. 16a. While the state law claims did not directly seek recovery of "plan benefits," the court recognized earlier in its opinion that the challenged conduct included the ESOP Committee's decisions in managing and investing the ESOP's assets, including the decision to enter into "the 1987 Envirocal transaction, and subsequent ESOP activities." *Id.* at 6a. ERISA standards indisputably governed that conduct. *See* 29 C.F.R. §2509.94–2(1) (1994) (discussing "fiduciary act of managing plan assets that are shares of corporate stock"); *Martin v. Feilen*, 965 F.2d 660, 667 (8th Cir. 1992) (ERISA may require ESOP fiduciary to act for ESOP-as-shareholder).

[8]*See, e.g.*, H.R. COMM. ON EDUCATION & LABOR, H.R. REP. No. 93–533 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4655 (focusing analysis of enforcement and preemption on "essential" need to "provide for *a uniform source of law*" in five areas, including "evaluation of fiduciary conduct" (emphasis added)); *id.* (listing, as among ERISA's primary purposes, "to establish minimum standards of fiduciary conduct for

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emption clause barred state regulation of fiduciary conduct, showing that a central goal of ERISA from the start was to make federal regulation of fiduciary responsibility exclusive.[9]

In the opinion below, the Ninth Circuit rejected its prior preemption analysis in *General American Life Insurance Co. v. Castonguay*, 984 F.2d 1518 (9th Cir. 1993)), believing that this Court's opinion in *Travelers* had "'markedly narrowed'" the scope of ERISA preemption (App. at 10a) (quoting *Toumajian v. Frailey*, 135 F.3d 648, 653–54 n.3 (9th Cir. 1998)) and required the court to narrow or reject what it described as *Castonguay*'s "broad language of undivided loyalties." App. at 16a. But the court misread *Travelers*, and *Castonguay*'s analysis continues to be sound.

Travelers narrowed only the periphery of ERISA preemption, addressing state laws that "relate to" ERISA plans not by imposing fiduciary duties on parties in ERISA relationships but by the indirect economic effect of changing the relative costs of services for which plans must pay. *See* 514 U.S. at 658–62.[10] Neither *Travelers* nor any later opinion of this Court addressed "the areas with which ERISA is

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Trustees, Administrators, and others dealing with retirement plans, to provide for their enforcement . . ."); H.R. CONF. REP. No. 93–1280 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5106–07 (describing agreement to give federal courts "*exclusive* jurisdiction [of] actions involving breach of fiduciary responsibility" (emphasis added)).

[9]For example, the bill that passed the House, as this Court explained, "provided that ERISA would supersede state laws 'relat[ing] to . . . [*inter alia*] fiduciary responsibilities, of persons acting on behalf of any [regulated] employee benefit plan . . . .'" *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98 n.18 (1983) (quoting H.R. 2, 93d Cong., 2d Sess., §514(a) (1974), *reprinted in* 3 Legislative History of the Employee Retirement Income Security Act of 1974, at 4057–58 (1976)). The Conference Committee rejected such narrow provisions in favor of the broad "relates to" language ultimately enacted. *See id.* at 98.

[10]This Court's two later opinions finding no preemption also involve indirect economic effects. *See DeBuono v. NYSA-ILA Med. & Clin. Servs. Fund*, 520 U.S. 806, 814–16 (1997); *Cal. Div. of Labor Stds. Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316, 324–34 (1997).

expressly concerned—'reporting, disclosure, *fiduciary responsibility*, and the like'" (*Cal. Div. of Labor Stds. Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316, 330 (1987) (emphasis added)), or narrowed the category of state law claims that can be recharacterized as arising under ERISA's civil enforcement scheme and thus completely preempted. *Travelers* thus has no bearing on the core ERISA issues that the Ninth Circuit addressed here and provides no reason to reject *Castonguay*'s preemption analysis.

Castonguay, a well-reasoned opinion by Judge Kozinski, addressed a California law that imposes personal liability on trustees for a trust's breach of certain contracts, holding that ERISA preempts the law as applied to ERISA fiduciaries with regard to a plan's breach of contract. 984 F.2d at 1521–22. The court held that a claim under that law, brought by a creditor of the plan against its trustees, "encroaches on the relationships regulated by ERISA," and thus is preempted, because it "subjects trustees to personal liability on account of things they do in discharging their responsibility to the trust." *Id.* at 1522. Such a threat of personal state law liability would alter the trustees' discharge of their ERISA duties "just as surely as direct regulation," the court stressed, because "a trustee exposed to additional personal liability for his acts as trustee may act much more timidly" (*id.*) and be "seriously distract[ed] . . . from his duties." *Id.* at 1523. For example, "when a trust is skating close to the financial edge," as was the case in *Castonguay*, "the trustees' fear of personal liability may keep them from doing what's necessary to get the trust on its feet again." *Id.* That fear would undermine "[o]ne of the key principles underlying ERISA," *i.e.*, that fiduciaries "must be devoted *solely* to the interest of plan beneficiaries." *Id.* Applying that principle, the court held that plan fiduciaries must be free, in the exercise of their discretion, to decide that it is in the best interests of the plan and its beneficiaries to breach a contract, notwithstanding the interests of the plan's creditors. *Id.* at 1523 & n.7.

The principles recognized in *Castonguay* apply here with even greater force. In this case, Plaintiffs' theory is that state law *prohibited* the plan administrators from approving ESOP mergers even if those administrators, in the exercise of their ERISA-regulated fiduciary judgment, found the transactions to be in the best interests of the ESOP's participants. Because the ESOP Committee members wore their ERISA-fiduciary hats in the challenged transactions—as they were required to do—they cannot also have been wearing their state law "manager of the debtor on the ESOP Notes" hat, and state law cannot impose fiduciary duties on their approval of those transactions.

B. The Ninth And Fifth Circuits' Preemption Holdings Conflict With Those Of Five Other Circuits.

As explained above, the Ninth Circuit imposed an improperly narrow test for preemption that allows ERISA and state law fiduciary duties to govern the same acts of managing and directing the investments of a plan. *See supra* at pp. 13–18. The Fifth Circuit opinion on which the court relied (*Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters., Inc.*, 793 F.2d 1456, 1468 (5th Cir. 1986)) took a similar approach. *See id.* These decisions conflict with holdings in five other Circuits.[11]

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[11]Because the panel's rulings on ERISA preemption and complete preemption rest on the same rationale (*see supra* at n.5), this Petition addresses without further distinction the opinions of the five conflicting Circuits, whether they concern complete preemption (as do four) or only preemption (as does one). *Compare Hull v. Fallon*, 188 F.3d 939, 942–43 (8th Cir. 1999), *cert. denied*, 528 U.S. 1189 (2000); *Smith v. Provident Bank*, 170 F.3d 609, 613 (6th Cir. 1999); *Jass v. Prudential Health Care Plan, Inc.*, 88 F.3d 1482, 1487–88 (7th Cir. 1996); *Smith v. Dunham-Bush, Inc.*, 959 F.2d 6, 10 (2nd Cir. 1992) (all finding complete preemption and, expressly or implicitly, preemption); *with Glaziers & Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Sec., Inc.*, 93 F.3d 1171, 1185 (3rd Cir. 1996) (addressing only preemption). Likewise, in discussing those opinions, we refer for simplicity's sake to

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1. In The Sixth And Third Circuits, ERISA Preempts Any State Law Claim Concerning An ERISA Plan Between Parties In An ERISA-Regulated Relationship.

The Sixth Circuit has squarely held that ERISA preempts any state law claim where a plan, participant or fiduciary is a party and the claim concerns a fiduciary or other duty of care regarding management of plan assets. *Smith v. Provident Bank*, 170 F.3d 609, 613–17 (6th Cir. 1999). Under *Smith*, when ERISA regulates a plan, it occupies the field of duties of care regarding the plan—fiduciary or other—and leaves no room for state law duties between parties thereto.

Plaintiffs in *Smith*, an ERISA plan participant and his ERISA plans, sued an array of individuals and entities for removing assets from the plan participant's ERISA plan investment accounts. As in this case, plaintiffs sued both in federal court under ERISA and in state court for common law breach of fiduciary duty, negligence and the like. The defendants removed the state court action. Unlike the Ninth Circuit here, the Sixth Circuit found preemption and *affirmed* the District Court's exercise of jurisdiction.

The Sixth Circuit held that ERISA preempted almost all of plaintiffs' state law claims, including those for breach of fiduciary duty. *Id.* at 612–17. Of special significance, the court so held *even assuming* that the lead defendant had ceased being an ERISA fiduciary by the time it removed the plan assets. That is, the court rejected the plan participant's theory that if the defendant was no longer an ERISA fiduciary at the time of the misconduct, its actions with respect to the participant's ERISA accounts could be judged by some other (allegedly greater) state law duty. *Id.* at 613. As the court explained, a state law fiduciary duty applicable to the

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"preemption" whether the case involved preemption only or complete preemption.

administration of ERISA plan assets *simply cannot coexist with ERISA*:

> [I]t is the nature of the claim—breach of fiduciary duty—that determines whether ERISA applies, not whether the claim will succeed. In enacting ERISA and broadly preempting state law, Congress intended to standardize the administration of employee benefit plans, including the duties and liabilities of fiduciaries. It is not a valid argument against preemption to say that the state seeks to impose greater obligations than Congress did. (*Id.*)

The Sixth Circuit's understanding of the broad scope of ERISA preemption of state law breach of fiduciary duty claims is demonstrated even more clearly by its analysis of the claims against two defendants who were involved with the disputed assets but may not ever have been "fiduciaries" under ERISA. ERISA preempted the state law claims against them for breach of fiduciary duty, the Sixth Circuit held, whether or not they qualified as ERISA fiduciaries (and thus would be subject to liability under ERISA). *Id.* The court flatly rejected the notion that anyone—ERISA fiduciary or not—could be subject to state law breach of fiduciary duty claims with respect to the management of an ERISA plan. ERISA imposes the *only* fiduciary duties regulating management of plan assets, preempting any state law duty, so that if a party is not liable under ERISA, it cannot be liable at all, even under state law: "if [the two defendants] do not meet ERISA's definition of a fiduciary, neither can be liable for breach of fiduciary duty with respect to management of an ERISA plan." *Id.*

The Third Circuit is in accord, having made clear that if a party is an ERISA fiduciary, ERISA occupies the field of duties between it and a plan, preempting otherwise valid claims for breach of state law fiduciary duties regarding management of plan assets. *See Glaziers & Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Sec., Inc.*, 93 F.3d 1171, 1185 (3rd Cir. 1996) (remanding for determination whether defendant brokerage firm qualified as ERISA

fiduciary, in which case ERISA would preempt any claim based on state law fiduciary relationship of stockbroker and client).

The conflict with the Ninth Circuit is striking. In the Sixth Circuit, ERISA's fiduciary provisions completely preempt the field, including all duties of loyalty or care that touch on an ERISA plan and involve *either* a participant *or* a fiduciary. (The ESOP Participants' claims in this case involve *both*.) In the Third Circuit, a party's ERISA-fiduciary status absolutely precludes the imposition of state law fiduciary duties with respect to acts involving the administration of plan assets. In these Circuits, no state law claim for breach of fiduciary duty can supplement or modify ERISA's specific set of duties, remedies and authorized suits. In the Ninth Circuit, by contrast, a plan participant now may pursue claims for breach of state law fiduciary duties against even a *current* ERISA fiduciary. That is, two parties can simultaneously have ERISA- and state law–governed relationships involving the same acts relating to the same ERISA plan. This threatens exactly the sort of conflicting duties under state and federal law that it is the central purpose of ERISA's preemption clause to avoid. *See, e.g.*, *Travelers*, 514 U.S. at 656–57.

2. The Second Circuit Has Rejected The "Dual Capacity" Analysis Used By The Ninth Circuit, Holding That ERISA Preempts Claims Based On Contractual Relationships Existing Before The ERISA Relationship.

The Second Circuit also has rejected the "dual capacity" analysis employed by the Ninth Circuit in the opinion below. In *Smith v. Dunham-Bush, Inc.*, 959 F.2d 6 (2d Cir. 1992), the plaintiff had agreed to transfer jobs from his British employer to its American affiliate in reliance on a promise that the affiliate would pay him retirement benefits, separate from those due under its ERISA plan, that would be com-

mensurate with those he would have received in England. 959 F.2d at 7. When the company reneged, the employee sued in state court for, *inter alia*, breach of contract. *Id.* The company removed. On appeal, the Second Circuit held that ERISA preempted the suit, despite the plaintiff's insistence that he had sued the company "*only in its capacity as an employer*, not as an administrator of the ERISA plan." *Id.* at 8, 10–11 (emphasis added).

As the Second Circuit acknowledged, the plaintiff argued "attractively" that he in no way contested his benefits due under the ERISA plan but sought only to enforce an antecedent promise to pay additional benefits assertedly unconnected to the plan. *Id.* at 12. Moreover, the company had made the promise based on the employee's prior relationship with the British employer *before* he became a participant in the American affiliate's ERISA plan. *Id.* at 7. Nonetheless, the Second Circuit rejected plaintiff's argument: once the plaintiff joined the plan, his remedies were limited to those under ERISA.

3. The Seventh And Eighth Circuits Have Held Preempted State Law Claims By ERISA Plan Participants Against Plan Administrators Based On Assertedly Parallel State Law Relationships.

Two other Circuits have rejected arguments against preemption that, while a defendant's acts were part of an ERISA relationship as health plan administrator, they were also part of a state law medical relationship imposing parallel duties of care. *See Hull v. Fallon*, 188 F.3d 939 (8th Cir. 1999), *cert. denied*, 528 U.S. 1189 (2000); *Jass v. Prudential Health Care Plan, Inc.*, 88 F.3d 1482 (7th Cir. 1996).[12] Each

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[12]The Seventh Circuit also agrees with the Second Circuit that ERISA preempts state law claims arising from contractual relationships existing prior to the ERISA relationship. *See Bartholet v. Reishauer A.G. (Zurich)*, 953 F.2d 1073, 1076 (7th Cir. 1992) (Easterbrook, J.) (rejecting (continued . . .)

case involved a negligence or malpractice claim against a doctor or nurse who, while working as a health plan administrator, declined to authorize a treatment. *See Hull*, 188 F.3d at 941; *Jass*, 88 F.3d at 1484–86. Each plaintiff argued that the act entailed medical advice or treatment, so that plaintiff's claim was based on a state law caregiver-patient relationship. *See Hull*, 188 F.3d at 942; *Jass*, 88 F.3d at 1488–89.

The Eighth Circuit conceded that the doctor in *Hull* had "necessarily exercise[d] medical judgment" in his act of evaluating plaintiff's need for a proposed treatment—conduct that plainly involves core features of a doctor-patient relationship subject to state law duties of care. 188 F.3d at 943. Nonetheless, the Eighth Circuit looked instead to the parties' ERISA-regulated relationship and held that "the essence of [plaintiff's] claim rests on the denial of benefits" and that ERISA thus preempted any claim based on the plausibly distinct state law relationship. *Id.* at 943. The Seventh Circuit, emphasizing that the plaintiff in *Jass* (like the ESOP Participants here) had filed a separate ERISA complaint against the nurse, held that the plaintiff could not "avoid 'complete preemption' by deceptively alleging that [the defendant] 'voluntarily assumed duties' . . . identical to her duties as a utilization review administrator for [the plan]." 88 F.3d at 1489. These decisions also conflict with the Ninth Circuit's new "dual capacity" analysis.

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plaintiff's characterization of claim for additional pension payments as claim to enforce preexisting contract under state law).

C. The Ninth Circuit's Opinion Undermines A Core Purpose Of ERISA By Making Unclear The Duties And Potential Liability Of Those Who Manage The Assets Of Hundreds of Thousands Of Pension Plans.

The conflict created by the Ninth (and Fifth) Circuit renders unclear the legal duties not only of fiduciaries of America's 11,500 or more ESOPs (which in 1999 received over $20 billion in contributions and held roughly $500 billion in stock),[13] but of *all* its private pension plans, which number over 700,000, have over 70 million participants and control assets exceeding $4 trillion.[14] Many such plans, of course, operate in numerous states, compounding the confusion and conflicting duties created by the decision below.

Such confusion undermines a core purpose of ERISA, through which Congress sought to create uniform federal standards to guide fiduciaries and to vest federal courts with exclusive jurisdiction over actions for breach of their fiduciary duties. *See* §§401–414, 29 U.S.C. §§1101–1114 (fiduciary standards); §502(e)(1), 29 U.S.C. §1132(e)(1) (exclusive jurisdiction). Congress plainly intended ERISA's preemption clause to displace state laws that impose fiduciary duties on ERISA fiduciaries with regard to their conduct in managing or administering plans. *See supra* at pp.16–17 & nn.8–9.

The Ninth Circuit has imperiled that core purpose of ERISA because it misread this Court's recent decisions

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[13] Http://www.the-esop-emplowner.org/pubs/stats.html (visited Feb. 8, 2002).

[14] U.S. Dep't of Labor, Pension & Welfare Benefits Admin. [PWBA], *Private Pension Plan Bulletin—Abstract of 1997 Form 5500 Annual Reports*, No. 10 (Winter 2001), *currently available at* http://www.dol.gov/dol/pwba/public/programs/opr/bullet97/cover.htm; U.S. Dep't of Labor, PWBA, *Fact Sheet—Changes in the Private Employment Based Pension and Health Systems Over the Past 25 Years* (Sept. 1999), *currently available at* http://www.dol.gov/dol/pwba/public/pubs/factsht2.htm.

about a different topic: the difficulty of defining the *outer limits* of ERISA preemption. *See supra* at pp.17–18 (discussing Ninth Circuit's erroneous view that *Travelers'* "narrowing" of ERISA preemption dictated new Ninth Circuit "dual capacity" analysis). By misguidedly applying *Travelers* to the core of ERISA preemption (and complete preemption), the Ninth Circuit has exposed ERISA fiduciaries in nine states to conflicting duties and personal liability under state law for their ERISA-regulated acts in managing pension plan assets. The Fifth Circuit opinion on which it relied poses the same threat in three more states. A decision by this Court is necessary to confirm the exclusivity of ERISA's uniform fiduciary standards in the core area of plan asset management, and thus to reassure plan administrators that ERISA provides the sole measure of their fiduciary duties and potential liability.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully,

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February 2002

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 99-17132, 99-17040 and 99-17474

[Filed September 7, 2001]

JULIO ABRAHAM, *et al.*,
Plaintiffs-Appellants,
v.
NORCAL WASTE SYSTEMS INC, *et al.*,
Defendants,
and
BANK OF AMERICA,
as successor to Security Pacific National Bank,
the Indenture Trustee,
Defendant-Appellee.

JULIO ABRAHAM, *et al.*,
Plaintiffs-Appellees,
v.
NORCAL WASTE SYSTEMS INC, *et al.*,
Defendants-Appellees,
THE BANK OF AMERICA,
Defendant-Appellant,
and
CHASE MANHATTAN BANK, N.A.,
BANK OF CALIFORNIA,
CALIFORNIA FEDERAL BANK,
Defendants.

BANK OF AMERICA NT & SA,
as successor in interest by merger with
Security Pacific National Bank, Indenture Trustee,

Plaintiff-Appellant,

v.

NORCAL SOLID WASTE SYSTEMS EMPLOYEE
STOCK OWNERSHIP PLAN AND TRUST,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of California

D.C. Nos. CV 94-3076 CAL, 99-1175 CAL

(September 7, 2001)

Before THOMPSON, O'SCANNLAIN, and TASHIMA, Circuit Judges.

TASHIMA, Circuit Judge:

These consolidated appeals arise out of a complex background of financial transactions and litigation stemming from the leveraged buyout of company stock by an employee stock ownership plan. Plaintiffs in the earlier of the two actions (No. 99-17040 and No. 99-17474) ("Plaintiffs") originally brought suit in California state court, alleging only state law causes of action in their complaint. Defendants successfully removed the case to federal district court on the basis of complete preemption, pursuant to the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.* The parties raise numerous issues on appeal from the ensuing litigation. Because we conclude that the

district court lacked original subject matter jurisdiction, necessary for removal pursuant to 28 U.S.C. § 1441, we must vacate the judgments below. We have jurisdiction to entertain this appeal from the district court's final judgment, 28 U.S.C. § 1291, and to decide the jurisdictional issue, *Toumajian v. Frailey*, 135 F.3d 648, 652-53 (9th Cir. 1998).

I. BACKGROUND

a. Facts

Norcal Solid Waste Systems, Inc. ("Norcal"), a California corporation, was an employee-owned garbage company. Plaintiffs are former employee-shareholders (or their heirs and assigns) of Norcal. Norcal created the Norcal Solid Waste Systems, Inc., Employee Stock Ownership Plan and Trust (the "Norcal ESOP" or "ESOP") to purchase shares from Plaintiffs in a leveraged buyout of company stock. There is no dispute that the ESOP is an employee benefit plan within the meaning of ERISA. In December 1986, Plaintiffs sold their stock to the ESOP as part of the leveraged buyout transaction for $65 million in cash and $36.5 million in long-term notes. Forty-four of the Plaintiffs also were Norcal employees and participants in the benefit plan ("ESOP participants").

The 1986 leveraged buyout was accomplished through a complex financing arrangement in which the ESOP's acquisition of Norcal's shares was financed by bank loans to Norcal, which in turn then lent those funds to the ESOP. Bank of America (the "Bank") served as a senior lender (among several banks) and a financial advisor to Norcal for the leveraged buyout. The long-term notes that were issued to the former shareholders pursuant to the buyout were governed by the terms of a trust indenture agreement (the "Indenture") between the Norcal ESOP, as obligor, and Security Pacific National Bank, as the trustee ("Security Pacific" or the "Trustee"). Security Pacific also acted as a lender to Norcal in the 1986 transaction.

The notes were non-recourse as against Norcal, were not secured by Norcal stock, were subordinated to the Norcal ESOP's senior indebtedness (*i.e.* the bank loans to Norcal that were subsequently lent to the ESOP), and were to be paid in accordance with ERISA regulations for exempt transactions. Among the other provisions of the Indenture relevant to the litigation were the following:

> Section 8.01(b): "In case an Event or Default has occurred and is continuing, the Trustee shall exercise such of the rights and powers vested in it by this Indenture, and use the same degree of care and skill in their exercise, as a prudent person would exercise or use under the circumstances in the conduct of his or her own affairs."
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> Section 8.07(3): "[The Plan agrees] to indemnify the Trustee for, and to hold it harmless against, any loss, liability or expense incurred without negligence or bad faith on its part, arising out of or in connection with the acceptance or administration of this trust, including the costs and expenses of defending itself against any claim or liability in connection with the exercise or performance of any of its powers or duties hereunder."
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> Section 10-2: "The Plan shall not consolidate with or merge into any entity or convey, lease or transfer its properties and assets substantially as an entirety to any Person unless the Plan shall first redeem the entire Outstanding principal of all of the Notes."

The Indenture also provided that "it shall be construed in accordance with and governed by the laws of the State of California."

In December 1987, Norcal consummated a transaction with Envirocal, Inc. ("Envirocal"), whereby the Norcal ESOP and the Envirocal ESOP (simultaneously with their respective sponsors) combined to form a single entity.[1] The former owners of Envirocal exchanged stock for a combination of cash and notes. Security Pacific also acted as a lender to Norcal in the 1987 Envirocal transaction. On May 15, 1988, in its capacity as the Trustee, Security Pacific sent an annual reporting letter to Plaintiff note holders stating, among other things, that "[n]o other action has been taken by the Trustee, in the performance of its duties under the Indenture, which, in its opinion, materially affect the Noteholders." Only in September 1988 did the ESOP advise its participants (44 of whom are among Plaintiff note holders) of the 1987 Envirocal transaction.

Between 1986 and April 1991, the Norcal ESOP paid each quarterly interest payment due on the notes, and the Trustee also transferred all of these payments to Plaintiff note holders, as required by the Indenture. In April of 1991, however, Norcal defaulted on its indebtedness to the bank lenders and to the Envirocal note holders, and the ESOP defaulted on its indebtedness to Plaintiff note holders. On March 7, 1991, Security Pacific sent letters to Norcal and the ESOP resigning as Trustee under the Indenture (as well as under the subsequent indenture formed for the Envirocal note holders, for which it also served as trustee), and on May 14, 1991 a successor trustee was formally substituted.

b. Proceedings

Plaintiffs commenced an action in California state court in 1994 against the Trustee, Norcal, the ESOP, Norcal's bank lenders, and several individual officers and directors of the

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[1] The parties disagree on the structure of the transaction for purposes of Section 10-2 of the Indenture.

defendant corporations (including some members of the ESOP Administrative Committee). The Bank was sued not only in its capacity as a lender in the 1986 leveraged buyout, but also as successor in interest to Security Pacific, which was both a lender and the Trustee.[2] Plaintiffs alleged state law causes of action including fraud, breach of contract, tortious interference with contract, negligence, breach of fiduciary duty, and unjust enrichment.

The alleged conduct underlying Plaintiffs' claims was a series of breaches, misrepresentations, omissions, concealment, and conflicts of interest by Defendants, as well as an alleged conspiracy among them, in conjunction with the initial leveraged buyout, the 1987 Envirocal transaction, and subsequent ESOP activities. These acts allegedly resulted in Plaintiffs' unwitting reliance in tendering their shares in Norcal for restricted notes, the failure to redeem or enforce redemption of those notes at the time of the Envirocal transaction, and the eventual default on those notes. Forty-four of the Plaintiffs, who were also ESOP participants, simultaneously initiated a separate action in federal district court against Norcal, the Norcal ESOP, and some individual defendants for the breach of their duties imposed by ERISA in conjunction with the 1987 Envirocal transaction and subsequent ESOP activities.

Defendants removed the action from state court to federal court on the basis of complete ERISA preemption. The district court denied Plaintiffs' motion to remand, concluding that, at least with respect to the subset of 44 Plaintiffs who were ESOP participants, the state law causes of action based on constructive fraud, fiduciary duty, and negligence were preempted by ERISA. The district court then asserted

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[2] The Bank succeeded to the interest of Security Pacific as the result of the merger of Security Pacific into the Bank.

supplemental jurisdiction over the remaining claims and parties. *See* 28 U.S.C. § 1367(a). On motion for partial summary judgment by Plaintiffs, the district court ruled on June 30, 1995, that the 1987 Envirocal transaction constituted a triggering event for purposes of redemption under Section 10-2 of the Indenture and that the ESOP had defaulted under the terms of that provision. In August 1995, Norcal and the ESOP completed a settlement with Plaintiffs for the principal due on the notes, but not the interest (the "Settlement"). Under the Settlement, Plaintiffs agreed to a broad release of all claims against all parties, excepting only their preservation of the claims against the Trustee falling outside the scope of the ESOP's contractual indemnity obligations to the Trustee pursuant to Section 8.07(3) of the Indenture. The district court subsequently entered orders determining the Settlement to be in good faith and dismissing the released claims and parties.

In February 1996, Plaintiffs filed a second amended complaint against the Bank of America alone. Prior to trial, Norcal and the ESOP intervened to obtain a declaration that they had no further indemnity obligations to the Bank under the Indenture after the Settlement. On December 17, 1996, the district court granted summary judgment in favor of Norcal and the ESOP on their complaint in intervention for declaratory relief. After trial on the remaining claims, judgment on the jury verdict was entered in favor of the Bank.[3] The district court denied Plaintiffs' motion for a new trial and entered final judgment on October 22, 1999. Plaintiffs timely appeal, and the Bank timely cross-appeals (No. 99-17040 and No. 99-17474).

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[3] The details of the verdict are immaterial to our analysis and disposition.

After the verdict, the Bank commenced a separate action in federal court against the ESOP seeking a declaration of its entitlement to indemnity under the Indenture for its post-Settlement defense costs in light of the specific findings of the special verdict. On cross-motions for summary judgment, the district court again ruled in favor of the ESOP on the indemnity issue. Final judgment in that action was entered on August 25, 1999. The Bank timely appeals (No. 99-17132).

II. JURISDICTION

Plaintiffs contend that the district court lacked subject matter jurisdiction at the time the case was removed and at the time of judgment; therefore, the denial of the motion to remand was error and the proceedings and judgment must be vacated.[4] The Bank, Norcal, and the ESOP contend that Plaintiffs' claims for constructive fraud, breach of fiduciary duty, and negligence in the state court complaint (at least with respect to the 44 Plaintiffs who are also ESOP participants) are subject to complete preemption under ERISA, providing the court with subject matter jurisdiction and a federal question to anchor removal of the entire action.[5]

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[4] None of the parties contends, nor is it the case, that any alleged jurisdictional defect on removal may have been corrected by the time of final judgment on the merits, either via diversity or otherwise. *Cf. Grubbs v. Gen. Elec. Credit Corp.*, 405 U.S. 699, 702-704, 92 S. Ct. 1344, 31 L.Ed.2d 612 (1972) (whether or not case is properly removed, if court proceeds to judgment on merits without objections, issue is whether district court would have had original jurisdiction if case had been filed in a federal court, measured at time of judgment). Thus the only relevant question is whether subject matter jurisdiction existed at the time of removal.

[5] For the purposes of this analysis, the original complaint is the operative pleading because that is the basis upon which removal was granted and Plaintiffs' motion to remand was denied. *See Toumajian*, 135 F.3d at 653 n. 2.

Questions of subject matter jurisdiction and removal are reviewed de novo. *Toumajian*, 135 F.3d at 652. The denial of a motion to remand a removed case by the district court is also reviewed de novo. *ARCO Envtl. Remediation, L.L.C. v. Dep't of Health and Envtl. Quality*, 213 F.3d 1108, 1111 (9th Cir. 2000).

Removal under 28 U.S.C. § 1441 requires that the complaint contain a claim within the original subject matter jurisdiction of the federal district court. *Toumajian*, 135 F.3d at 653. Thus, only if we can discern a federal question was removal proper.

Plaintiffs' complaint did not facially assert any federal claim; therefore, the original subject matter jurisdiction required to support removal exists only if ERISA completely preempted any of the state law claims. *See Rutledge v. Seyfarth, Shaw, Fairweather, & Geraldson*, 201 F.3d 1212, 1215 (9th Cir.), *amended by* 208 F.3d 1170 (9th Cir.), *cert. denied*, 531 U.S. 992, 121 S. Ct. 482, 148 L.Ed.2d 456 (2000). The doctrine of complete preemption has been described as "an independent corollary to the well-pleaded complaint rule". *Id.* (quoting *Harris v. Provident Life and Accident Ins. Co.*, 26 F.3d 930, 934 (9th Cir. 1994)). Complete preemption can be invoked only when two conditions are satisfied: (1) ERISA expressly preempts the state law cause of action under 29 U.S.C. § 1144(a) (*i.e.* "conflict preemption") and (2) that cause of action is encompassed by the scope of the civil enforcement provision of ERISA, 29 U.S.C. § 1132(a) (*i.e.* "displacement"). *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 60, 107 S. Ct. 1542, 95 L.Ed.2d 55 (1987); *Rutledge*, 201 F.3d at 1216. Neither of these conditions was satisfied in this case.

a. Conflict Preemption under 29 U.S.C. § 1144(a)

Section 1144(a) states, in relevant part, that "provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or

hereafter relate to any employee benefit plan. . . ." The critical phrase "relate to" has been the source of much confusion as well as multiple and slightly differing analyses by this court. *See, e.g., Rutledge*, 201 F.3d at 1216-19 (surveying our approach to the "relates to" requirement but ultimately declining to develop a test "describing the outer bounds of ERISA [conflict] preemption"). We recognize that while this "relate to" language has been construed quite broadly in the past, the Supreme Court has narrowed the applicability of § 1144(a) in recent years ever since its decision in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 115 S. Ct. 1671, 131 L.Ed.2d 695 (1995). *See also Toumajian*, 135 F.3d at 654 n.3 (acknowledging that "[r]ecently, the scope of this broad 'relate to' preemption was markedly narrowed" (quoting *Travelers*, 514 U.S. at 655, 115 S. Ct. 1671)).

State law "relates to" an ERISA benefit plan if there is a "connection with" or "reference to" such a plan. *Blue Cross v. Anesthesia Care Assocs. Med. Group, Inc.*, 187 F.3d 1045, 1052 (9th Cir. 1999) (quoting *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 324, 117 S. Ct. 832, 136 L.Ed.2d 791 (1997)). As we discussed in *Rutledge*, the "reference to" prong of the test is fairly precise and did not apply there–nor is it applicable here–because the state law in question did not act "immediately and exclusively" upon an ERISA plan nor is such a plan "essential" to the operation of the law. 201 F.3d at 1216 (quoting *Dillingham*, 519 U.S. at 325, 117 S. Ct. 832). Plaintiffs' allegedly preempted claims here were solely based on state law theories of constructive fraud, breach of fiduciary duty, and negligence, so the relevant state law certainly does not act immediately and exclusively on an ERISA plan, nor is such a plan essential to the operation of the law. In order "to determine whether a state law has the forbidden connection, we look both to the objectives of the ERISA statute as a guide to the scope of the state law that

Congress understood to survive, as well as to the nature and effect of the state law on ERISA plans." *Egelhoff v. Egelhoff*, 532 U.S. 141, 121 S. Ct. 1322, 1327, 149 L.Ed.2d 264 (2001) (internal quotation marks omitted). The only argument advanced for removal, and upon which the district court relied, is that the state law claims have the necessary "connection with" an ERISA plan because they encroach upon ERISA-regulated relationships.[6]

We have previously recognized that "a core factor leading to the conclusion that a state law claim is preempted is that the claim bears on an ERISA-regulated relationship." *Rutledge*, 201 F.3d at 1219. Under the rationale of a "relationship" test, "we look to whether the state law encroaches on relationships regulated by ERISA, such as between plan and plan member, plan and employer, and plan and trustee." *Blue Cross*, 187 F.3d at 1053. Those regulated relationships that are purported to be encroached upon in this case are between: (i) plan and "parties in interest," as

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[6] The parties do not suggest, and we do not believe there to be, any reason that the state law claims at issue here may fall within the three traditional areas of preemption identified in *Travelers* and incorporated into the analysis of this court in *Arizona State Carpenters Pension Trust Fund v. Citibank*, 125 F.3d 715, 723 (9th Cir. 1997), namely state laws that: (1) mandate employee benefit structures or their administration; (2) bind employers or plan administrators to particular choices or preclude uniform administrative practice; and (3) provide alternative enforcement mechanisms to obtain ERISA plan benefits. Nor do we find that jurisdiction could be supported by preemption under any of the myriad "different, though compatible, tests" formulated by this court in our elusive quest "to follow the Supreme Court in fulfilling the statutory mandate of broad preemption without intruding upon state laws beyond the intention of Congress and the objectives of ERISA." *Rutledge*, 201 F.3d at 1217. Even were we to "eschew[ ] such multi-factor tests in favor of a more holistic analysis guided by Congressional intent," our analysis would be no different. *Dishman v. UNUM Life Ins. Co. of Am.*, 250 F.3d 1272, 1278 n.15 (9th Cir. 2001). The only asserted basis for preemption here is an intrusion upon ERISA-regulated relationships.

defined in 29 U.S.C. § 1002(14); (ii) plan and participants; and (iii) plan and fiduciaries. We find none of these arguments persuasive.

With respect to the first relationship, the Bank, Norcal, and the ESOP each suggests that ERISA comprehensively governed the sale of stock and extension of credit between a plan and "parties in interest," such as the employees of the plan sponsor; and that absent the express statutory exemptions provided by ERISA, any transaction constituting a "lending of money or other extension of credit between the plan and a party in interest" would have been a prohibited transaction. *See* 29 U.S.C. § 1106(a)(1)(B); *see also id.* § 1108(b)(3) (exempting loan when "primarily for the benefit of participants and beneficiaries of the plan" and "at an interest rate which is not in excess of a reasonable rate") *and* § 1108(e) (exempting acquisition by a plan of qualifying employer securities if "for adequate consideration" and "no commission is charged"). Certainly that subset of Plaintiffs who were current Norcal employees would be "parties in interest" for the purposes of the prohibited transaction provision. *See id.* § 1002(14)(A). But the state law claims alleged in the initial complaint did not implicate the prohibited transaction provision, which "serves ERISA's purposes by protecting a plan's participants and beneficiaries from a depletion of plan assets through shady, inside deals." *Rutledge*, 201 F.3d at 1222. Indeed, the claims do not remotely concern the objectives of ERISA.

Like all Plaintiffs, the employees were suing as note holders for state law fraud, breach of fiduciary duty, and negligence arising from a transaction that was expressly exempted from the prohibited transaction provision; their status as "parties in interest" is irrelevant. Unlike in *Rutledge*, where the preempted claims were premised on a relationship between a plan and a legal service provider in the very respects governed by ERISA's regulation of prohibited transactions, the state law claims here do not bear

upon any ERISA-governed relationship between a plan and "parties in interest." *See id.* ("Because the allegation at issue in the state law claims . . . is precisely the sort of prohibited transaction governed by ERISA, we hold . . . that the claims are preempted."). By carefully crafting exceptions to the transactions prohibited under ERISA and the conditions for those exceptions, Congress presumably understood the scope of the state law that would otherwise survive to govern such transactions in all aspects unrelated to the objectives and administration of ERISA. In this way, the ESOP's relationship with Plaintiffs who were also Norcal employees was no different from its relationship with the rest of the Plaintiff note holders. *Cf. Arizona State Carpenters*, 125 F.3d at 724 ("As a service provider offering nonfiduciary custodial services, Citibank's relationship with the Trust Funds was no different from that between Citibank and any of its customers."). Accordingly, we conclude that "[i]n the circumstances of this case, the connection between the state common law principles and ERISA's regulation of employee benefit plans is simply too tenuous, remote or peripheral to trigger preemption." *Id.* (internal quotation marks and citation omitted).

Nor, under similar reasoning, is a relationship between plan and participant encroached upon here. Those Plaintiffs who were also ESOP participants have an independent creditor relationship with the ESOP as a corporate entity based upon their status as former shareholders and current note holders under the Indenture. *See Gen. Am. Life Ins. Co. v. Castonguay*, 984 F.2d 1518, 1521-22 (9th Cir. 1993) ("But ERISA doesn't purport to regulate those relationships where a plan operates like any other commercial entity–for instance, the relationship between the plan and its own employees, *or the plan and its insurers or creditors*, or the plan and the landlords from whom it leases its office space." (emphasis added)). The claims of fraud, breach of fiduciary duty, and negligence arise from that status as note holders, and do not

"touch on" the status of the ESOP as a benefit plan or of any of Plaintiffs as participants in that plan (or on any claim the participants may make against the plan in that capacity). *Cf. Blue Cross*, 187 F.3d at 1054 ("The . . . claims concern only promises that Blue Cross made as a health care plan to its participating physicians. They do not touch on Blue Cross' fiduciary status, or any claims that a beneficiary may make against Blue Cross in that capacity.").

In *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enter., Inc.*, 793 F.2d 1456 (5th Cir. 1986), an ERISA trust sought to invoke the state law of fiduciary duty as a stockholder by bringing a claim against a corporate director who was also a plan fiduciary. Finding no conflict preemption, the court stated:

> The director's duty arises from his status as director; the law imposes the duty upon him in that capacity only. Similarly, the shareholder's rights against the corporate director arise solely from his status as shareholder. That in such a case as ours the director happens also to be a plan fiduciary and the shareholder a benefit plan has nothing to do with the duty owed by the director to the shareholder. The state law and ERISA duties are parallel but independent: as director, the individual owes a duty, defined by state law, to the corporation's shareholders, including the plan; as fiduciary, the individual owes a duty, defined by ERISA, to the plan and its beneficiaries. Thus, the state law does not affect relations between the ERISA fiduciary and the plan or the plan beneficiaries as such; it affects them in their separate capacities as corporate director and shareholder.

Id. at 1468. Here, any duties owed by the plan to the ESOP participant Plaintiffs are also parallel but independent to those owed to them as note holders. The rights and duties under state law between the ESOP and the note holders, whether ESOP participants or not, are distinct from any ERISA-governed relationship between a plan and its participants. The state claims do not affect that regulated relationship.

The third relationship allegedly encroached upon is that between a plan and its fiduciaries, specifically those members of the ESOP Administrative Committee named in the complaint. It is suggested that, as ERISA fiduciaries, the members of the ESOP Administrative Committee were required by ERISA to act "solely in the interest of the [plan's] participants and beneficiaries" for the "exclusive purpose" of "providing benefits to participants and their beneficiaries," as well as "defraying reasonable expenses of administering the plan." 29 U.S.C. § 1104(a)(1)(A). Assuming that the members of the Administrative Committee are fiduciaries within the meaning of 29 U.S.C. § 1002(21)(A), we do not believe that the ERISA-regulated relationship is implicated here. Relying on *Castonguay*, the ESOP contends that the Committee could not act with that undivided loyalty to the plan and its participants and beneficiaries required by ERISA if state law bound its members to account for the interests and obligations asserted by Plaintiffs. In *Castonguay*, an insurer brought state law fraud and negligent misrepresentation claims against an ERISA trustee based on allegedly false statements made while securing for the trust an insurance policy to pay for unmanageable plan payments to participants. 984 F.2d at 1520. Finding the state law claims to be preempted because they raised "precisely the sort of divided loyalty ERISA is meant to prevent," the court concluded: "We hold that, as a matter of federal law, ERISA plan trustees can't be held personally liable for the trust's contracts." *Id.* at 1523-24.

We first note that *Castonguay* was decided prior to the recent trend narrowing the preemptive force of the "relates to" standard under § 1144(a). Moreover, despite the broad language of undivided loyalties in *Castonguay*, it is not immediately apparent how the alleged fraud, breach of duty, and negligence of the Committee members on behalf of the ESOP here would directly conflict with their fiduciary duties under ERISA. Unlike that case, the state law claims here did not arise from transactions directly relating to plan benefits or administration. The conduct at issue concerned the acquisition of Norcal shares in exchange for restricted notes and a subsequent failure to redeem those notes. As such, the only impact that the state law duties might have had on the plan or its beneficiaries is an indirect economic burden, which we have held to be insufficient for conflict preemption. *See Blue Cross*, 187 F.3d at 1052 (holding "the economic effects that . . . claims might have on ERISA plans are not sufficient for preemption to occur"). Finally, as in *Sommers*, the members of the Committee are not being sued in their capacity as plan fiduciaries, but rather as the agents of the ESOP corporate entity that obtained Norcal shares from Plaintiff note holders. State law imposes duties upon them in that capacity only; it does not affect them in their capacity as ERISA plan fiduciaries and thus does not encroach upon any regulated relationship between the plan and its fiduciaries.

Plaintiffs brought suit in their capacity as note holders pursuant to the terms of the Indenture, which by its own terms is governed by California law. Although some Plaintiffs were also ESOP participants and Norcal employees, their claims were brought solely in their capacity as former shareholders and current creditors. Moreover, this financial relationship arose from a transaction explicitly exempted from ERISA regulations and the claims were unrelated to any aspect of a relationship governed by those regulations. The fraud, breach of fiduciary duty, and

negligence causes of action under state law have nothing to do with benefits, the administration of a benefit plan, or any duties imposed by ERISA. No ERISA-regulated relationship is encroached upon by the state law claims. Therefore, the state law claims do not "relate to" an ERISA benefit plan within the meaning of 29 U.S.C. § 1144(a). We conclude therefore that there was no basis to find conflict preemption under ERISA; thus, that the first condition for complete preemption was unsatisfied.

b. Displacement under 29 U.S.C. § 1132(a)

Section 1132(a) provides the exclusive claims that are available under ERISA, as well as by whom and against whom such claims may be brought. *See Toumajian*, 135 F.3d at 656. The Bank, Norcal, and the ESOP all contend that even though the state complaint did not state an ERISA cause of action on its face, the claims of the ESOP participant Plaintiffs should be displaced for purposes of complete preemption analysis because they are encompassed by ERISA's civil enforcement provision, specifically § 1132(a)(2)[7] and (a)(3).[8] We disagree.

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[7] Section 1132(a)(2) provides that a civil action may be brought "by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title." Section 1109 states in relevant part:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any such losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through the assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem

(continued . . .)

Pursuant to the terms of those subsections, "[p]articipants and beneficiaries, along with plan fiduciaries, depending on their respective roles, are authorized to bring actions for appropriate relief for breach of fiduciary duty or for injunctions or to obtain other appropriate equitable relief to redress an ERISA violation or to enforce the terms of the plan or the provisions of ERISA." *Toumajian*, 135 F.3d at 656; *see also* 29 U.S.C. § 1132(a)(2), (a)(3). Assuredly, a subset of Plaintiffs are plan participants entitled to bring suit under the civil enforcement provision of ERISA. In fact, the ESOP participant Plaintiffs here did precisely that by filing a separate federal complaint contemporaneously with the state court action that was later removed. The claims asserted by all Plaintiffs in the state court action, however, do not fall within the scope of § 1132(a) because those claims are based upon rights that arise under state law in their capacity as former shareholders of Norcal and current note holders under the Indenture, not upon any rights that are conferred, enforced, or governed by ERISA (nor upon a violation of the terms of a plan). As we have previously noted, "[A]n otherwise preempted claim may survive to the extent that it relies on a theory independent of the benefit plan." *Tingey v. Pixley-Richards West, Inc.*, 953 F.2d 1124, 1131 (9th Cir. 1992).

(. . . continued)

> appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

29 U.S.C. § 1109(a).

[8] Section 1132(a)(3) provides that a civil action may be brought:

> by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

As discussed at length earlier, the claims of fraud, breach of fiduciary duty, and negligence at issue seek relief for all Plaintiffs on the basis of their reliance in tendering their Norcal shares to the ESOP, the eventual default on their notes, and the failure to redeem or enforce redemption on their notes at the time of the Envirocal transaction. Also, for the purposes of those Plaintiffs who could be considered "parties in interest," the leveraged buyout is an exempted transaction. Plaintiffs are not seeking relief on behalf of an ERISA plan, as required under the express terms of 29 U.S.C. § 1109(a), which is incorporated into § 1132(a)(2), and our case law. *See Toumajian*, 135 F.3d at 656 (citing *Buster v. Greisen*, 104 F.3d 1186, 1189 (9th Cir. 1997)). Nor do Plaintiffs' claims derive from a breach of "any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter." § 1109(a). Therefore § 1132(a)(2) is inapplicable. Moreover, none of these Plaintiffs "seek[s] relief as a participant, beneficiary, or fiduciary to enjoin any act or obtain any other equitable relief to redress any violations or enforce any provisions of ERISA." *Toumajian*, 135 F.3d at 656. Therefore § 1132(a)(3) is not applicable either.

Norcal and the ESOP seek to distinguish *Toumajian* on the ground that the complaint at issue in that case asserted state law claims for professional malpractice against a non-fiduciary service provider, whereas in this case ERISA fiduciaries were named in the complaint. But irrespective of the status of any of Defendants as the fiduciaries of an ERISA plan, none of the state law claims can be characterized as fiduciary breach claims within the scope of ERISA's civil enforcement provision. Simply put, the claims do not concern any plan fiduciaries in their capacity as such. Nor do they otherwise fall within the scope of ERISA's civil enforcement provision, 29 U.S.C. § 1132(a). We conclude therefore that there was no basis for displacement under

ERISA; thus, the second condition for complete preemption was also unsatisfied.

III. CONCLUSION

In summary, we conclude that neither of the necessary conditions for complete preemption under ERISA was satisfied here. Plaintiffs brought suit based on state law theories of fraud, breach of fiduciary duty, and negligence that cannot be said to "relate to" an ERISA plan within the meaning of 29 U.S.C. § 1144(a); nor are the claims encompassed within the scope of ERISA's civil enforcement provision, 29 U.S.C. § 1132(a). It is of no consequence that some Plaintiffs were also employees of the plan sponsor and plan participants at the time of suit because the claims have nothing to do with their status as such. Like all Plaintiffs, the ESOP participants brought suit in state court solely in their capacity as former shareholders and current note holders pursuant to the terms of the Indenture. Thus, the state law claims have no bearing on any ERISA-governed relationship and are not displaced by ERISA's civil enforcement scheme. Because there is no basis for complete preemption under ERISA, there was no federal question subject matter jurisdiction to support removal. And without a federal question, there was no anchor for the assertion of supplemental jurisdiction.

Accordingly, the judgment in each case is vacated and these cases are remanded to the district court with directions that, in No. 99-17040 and No. 99-17474, the case be remanded to state court and, in No. 99-17132, the action be dismissed without prejudice. Plaintiffs-Appellants in No. 99-17040 shall recover their costs on appeal from Defendants-Appellees. The parties in No. 99-17132 shall bear their own costs on appeal.

VACATED and REMANDED.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JULIO ABRAHAM, ET AL.,

Plaintiffs

v.

NORCAL WASTE SYSTEMS, INC., ET AL.,

Defendants.

C-94-3076 CAL

San Francisco, CA

November 18, 1994

Transcript of Proceedings

Before LEGGE, District Judge.

The Court: * * * The plaintiffs' motion to remand here is in 94-3076, and the assertion of jurisdiction by the defendants, which I think is correct, is that three of the state claims are preempted by ERISA: the constructive fraud claim, the fiduciary duty claim, and the negligence claim. And I don't think that this distinction among the parties, that is, that we have some note holders who are covered by – who are covered by ERISA, and we have some who are not, and that the suit is by people in their capacity as note holders, rather than their capacity as ERISA beneficiaries, really

answers the question, because I think the sweep of ERISA is a lot broader than that.

I think the sweep of ERISA, for all preemption and jurisdictional purposes, is whether common-law causes of action could or would, directly or indirectly, interfere with the relationships that are related by ERISA; in essence, by creating duties on the part of ESOP defendants that could be potentially inconsistent with the duties imposed by ERISA.

I think – with that preemption, I think the rest of the claims and the rest of the parties stay here under, whether you want to call it pendent jurisdiction, or a later test, supplemental jurisdiction. I think the jurisdiction is here.

* * *

(PROCEEDINGS ADJOURNED)

Certificate of Reporter

I, Raymond Linkerman, the undersigned official reporter of the United States District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, California, do hereby certify:

That the foregoing transcript, pages numbered 1 through 31 inclusive, constitute a true, full and correct transcript of my shorthand notes taken as such official reporter of the proceedings hereinbefore entitled, and reduced to typewriting to the best of my ability.

/s/ Raymond Linkerman
Raymond Linkerman

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 99-17132, 99-17040 and 99-17474

[Filed November 14, 2001]

JULIO ABRAHAM, *et al.*,
Plaintiffs-Appellants,
v.
NORCAL WASTE SYSTEMS INC, *et al.*,
Defendants,
and
BANK OF AMERICA,
as successor to Security Pacific National Bank,
the Indenture Trustee,
Defendant-Appellee.

JULIO ABRAHAM, *et al.*,
Plaintiffs-Appellees,
v.
NORCAL WASTE SYSTEMS INC, *et al.*,
Defendants-Appellees,
THE BANK OF AMERICA,
Defendant-Appellant,
and
CHASE MANHATTAN BANK, N.A.,
BANK OF CALIFORNIA,
CALIFORNIA FEDERAL BANK,
Defendants.

BANK OF AMERICA NT & SA,
as successor in interest by merger with
Security Pacific National Bank, Indenture Trustee,

Plaintiff-Appellant,

v.

NORCAL SOLID WASTE SYSTEMS EMPLOYEE
STOCK OWNERSHIP PLAN AND TRUST,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of California

D.C. Nos. CV 94-3076 CAL, 99-1175 CAL

(November 14, 2001)

Before THOMPSON, O'SCANNLAIN, and TASHIMA, Circuit Judges.

Bank of America's request for judicial notice is denied.

The panel has voted to deny the petitions for panel rehearing. Judges O'Scannlain and Tashima vote to deny the petitions for rehearing en banc and Judge Thompson so recommends. The full court has been advised of the petitions for rehearing en banc and no judge of the court has requested a vote en banc rehearing. *See* Fed. R. App. P. 35(b).

The petitions for panel rehearing and the petitions for rehearing en banc of Bank of America and Norcal Waste Systems, Inc. Employee Stock Ownership Plan and Trust are denied.

STATUTORY PROVISIONS INVOLVED

Section 409(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1109(a), provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

Section 502(a) of ERISA, 29 U.S.C. §1132(a), provides in relevant part:

> Persons empowered to bring a civil action. A civil action may be brought— . . . (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title; (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

Section 514(a) of ERISA, 29 U.S.C. §1144(a), provides in relevant part:

> Supersedure; effective date. [T]he provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under 1003(b) of this title.

PARTIES TO THE PROCEEDING (CONT'D)

The Plaintiffs below, Respondents herein, were Julio Abraham, Paul Agazzi, Giusppe Aiello, Bennie Anselmo, Sr., Thomas Arens, Renato Avanzino, Lily Bacigalupi, Peter Bacigalupi, Jr., David E. Ballestrazze, Mike Ballestrazze, William Bandettini, Mary Barieri, John Baroni, Pietro Battilana, Antoinette Bavoso, Michael J. Biagini, William Biondini, Sr., Franklin Bishop, Herbie Boyd, Madeline Brandi, Paul Brunetta, Natalio Cadematori, Flavio Calcagno, Fernando Cambri, Rita Canevari, Thomas J. Canevari, Primo Capella, Costantino Caramatti, John Caruso, Amy M. Catelli, Getulio Catena, Frank Chappellone, Edward Chiappari, Attilio Chiesa, Estate of George Codino, Quanito Cuneo, Ugo Cuneo, Victor D'Agnolo, Ray Dal Pogetto, Casimiro Damele, Alfred De Martini, Eugene De Martini, Gino De Martini, Paul De Martini, Adolfo Del Carlo, Vince Delfino, Lawrence Della Cella, Mary Della Cella, Susan Della Cella, Anita Delucchi, Mario Delucchi, Normal Depaoli, Angelo L. Devincenzi, Gloria Devincenzi, James D. Devincenzi, Vicki Duhagon, Estate of J.B. Ellis, Alipio Fatica, Elmo Fatica, Giobatta Fazio, Leon Ferguson, Ana Ferrando, Luciano Ferrari, Charolette Fini, James Firpo, Sergio Folena, Alesio Foppiano, Fortunato Conti, Eva Franceschi, Pete Franceschi, Estate of Anna Marie Franco, Giacomo Franco, John P. Franco, John Frederick, Dorothea Garaventa, Edward Germano, Benedetto Ghigliazza, Bernardo Ghigliazza, Frederico Ghiglieri, Anna Ghirardozzi, Anna Ghirardozzi, Gloria Ghirardozzi, Lou Giannone, Carlo Ginocchio, Hugo Giovannini, Sisto Giuliacci, Ubaldo Gobbo, Mario Grelli, Piero Grelli, Barbara Hamilton, Orel Jackson, Jr., Pearlie B. Lee, Harold Lopez, Joseph Lucchetti, Luigi Sciamanna, Attilio Malatesta, Emil Mangini, Louis Matteucci, Roger Micheli, Luis Morales, Giacomo Moscone, John Moscone, Angelo Musante, Alvaro Nardi, Estate of Michele Nardi, Sandy Obertello, Tony Oneto, Ivan Oplanic, Vincenzo

Pasquinelli, Antonio Passetti, Quinto Passetti, Alfredo Perli, Otto Perucci, Robert Pessagno, Virginia Pessagno, Rodovan Pesusic, Vonda Peverada, Hugo Pisani, Armando Pucci, Grace Puccinelli, Sergo Puccinelli, Flora Raggio, Inez Rajewski, Jack Rajewski, Louie J. Ratto, Paul Ratto, Peter Ratto, Angelo Ricchetti, Francesco Rissoto, William S. Roberts, Ernest Ronzani, Raniero Roselli, Mario Rossi, Albert Sciamanna, William Segarini, Ray Sharp, Sr., Dante Steccone, Mario Steccone, Luis Stella, Estate of Billy Terry, Luis M. Torres, Tom Traverso, Linda Tregenza, Judy Vucci, Paul Worden, and Tony Zappettini.

Supreme Court, U.S.
FILED
MAR 18 2002

Nos. 01-1179 and 01-1187

In The

Supreme Court of the United States

BANK OF AMERICA, N.A.,

Petitioner,

v.

JULIO ABRAHAM, *et al.*,

Respondents.

NORCAL WASTE SYSTEMS, INC. and
NORCAL WASTE SYSTEMS, INC.
EMPLOYEE STOCK OWNERSHIP PLAN AND TRUST,

Petitioners,

v.

JULIO ABRAHAM, *et al.*,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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March 18, 2002

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

Respondents submit this Counter-Statement of Questions Presented because the petitioner Bank of America (Docket No. 01-1179), and petitioners Norcal Waste Systems, Inc. and Norcal Waste Systems, Inc. Employee Stock Ownership Plan and Trust (Docket No. 01-1187), have presented questions in their respective petitions which are not raised by the decision of the Court of Appeals for the Ninth Circuit. The only question fairly presented by the Court of Appeals' decision is this:

1. Did not the Court of Appeals correctly apply the jurisdictional rule of *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987), in holding that neither prong of the ERISA complete preemption test was satisfied and removal was improper in light of its finding that respondent note holders' state law claims do not encroach upon any ERISA-regulated relationship, have nothing to do with ERISA benefits, the administration of a benefit plan or any duties imposed by ERISA and are not based upon any rights that are conferred, enforced or governed by ERISA, nor upon a violation of the terms of a plan?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 DISCLOSURE

The parties to the proceedings are correctly set out in petitioners' papers. *See* Norcal Pet. at ii; Bank Pet. at ii-iii. Each of the respondents is an individual.

TABLE OF CONTENTS

Page

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS AND RULE 29.6 DISCLOSURE ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

COUNTER-STATEMENT OF THE CASE 3

A. Facts 4

B. Complaint And Proceedings 4

C. Court Of Appeals' Decision 5

1. Conflict Preemption 6

2. Displacement 9

REASONS FOR DENYING THE WRIT 10

A. The Holding That The Note Holders' Claims Fall Outside The Scope Of ERISA's Civil Enforcement Provisions Does Not Conflict With The Decision Of Any Other Court of Appeals And Is Entirely Correct 12

1. The Court Of Appeals' Holding That The Claims Fall Outside The Scope Of ERISA's Civil Enforcement Provisions Does Not Conflict With The Decision Of Any Other Court Of Appeals 14

TABLE OF CONTENTS – Continued

Page

2. Petitioners Distort The Court Of Appeals' Holding 16

B. The Holding That The Note Holders' Claims Are Not Conflict Preempted Does Not Conflict With The Decision Of Any Other Court of Appeals And Is Entirely Correct 18

1. The Court Of Appeals' Decision Does Not Conflict With The Decision Of Any Other Court Of Appeals 19

2. Contrary To The Bank's Argument, The Court Did Not Hold That ESOPs Are Excluded From ERISA Coverage 23

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES:

Bartholet v. Reishauer A.G. (Zurich), 953 F.2d 1073 (7th Cir. 1992) 22

Buce v. Allianz Life Ins. Co., 247 F.3d 1133 (11th Cir. 2001) 26-27

Cal. Div. of Labor Standards v. Dillingham Standards, N.A., Inc., 519 U.S. 316 (1997) 7, 18, 19

Caterpillar Inc. v. Williams, 482 U.S. 386 (1987) 18

Diduck v. Kaszycki & Sons Contractors, Inc., 974 F.2d 270 (2d Cir. 1992) 21

Egelhoff v. Egelhoff, 532 U.S. 141 (2001) 7, 18, 20

Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust For Southern Cal., 463 U.S. 1 (1983) 12, 18

General American Life Ins. v. Castonguay, 984 F.2d 1518 (9th Cir. 1993) 19

Glazier & Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Sec. Inc., 93 F.3d 1171 (3d Cir. 1996) 20, 21

Hospice of Metro Denver, Inc. v. Group Health Ins., 944 F.2d 752 (10th Cir. 1991) 20

Hughes Aircraft Co. v. Jacobson, 525 U.S. 432 (1999) 16

Hull v. Fallon, 188 F.3d 939 (8th Cir. 1999), *cert. denied*, 528 U.S. 1189 (2000) 22

Jass v. Prudential Health Care Plan, Inc., 88 F.3d 1482 (7th Cir. 1996) 22

Lordmann Enterprises, Inc. v. Equicor, Inc., 32 F.3d 1529 (11th Cir. 1994) 20

TABLE OF AUTHORITIES – Continued

Page

LoPresti v. Terwilliger, 126 F.3d 34 (2d Cir. 1997) ..21, 22

Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825 (1988) 19

Martin v. Feilen, 965 F.2d 660 (8th Cir. 1992)..... 25

Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987) 3, 5, 11, 12

Moench v. Robertson, 62 F.3d 553 (3d Cir. 1995)..... 25-26

Moran v. Rush Prudential HMO, Inc., 230 F.3d 959 (7th Cir. 2000), *cert. granted*, 121 S. Ct. 2589 (2001) 26-27

N.Y. State Conf. of Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995).....19, 20

Peacock v. Thomas, 516 U.S. 349 (1996)..... 14

Pegram v. Herdrich, 530 U.S. 211 (2000) 16, 20

Rutledge v. Seyfarth, Shaw, Fairweather, & Geraldson, 201 F.3d 1212 (9th Cir.), *amended by* 208 F.3d 1170 (9th Cir.), *cert. denied*, 531 U.S. 992 (2000) 24

Smith v. Dunham-Bush, Inc., 959 F.2d 6 (2d Cir. 1992)..... 22

Smith v. Provident Bank, 170 F.3d 609 (6th Cir. 1999).....14-15, 20

Toumajian v. Frailey, 135 F.3d 648 (9th Cir. 1998)..... 10

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

28 U.S.C. § 1441(b) 1

Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq*..... 3

ERISA § 409(a), 29 U.S.C. § 1109(a) 2

ERISA § 502(a), 29 U.S.C. § 1132(a) ..... *passim*

ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B)..... 15

ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) ..... *passim*

ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) 9, 13, 15

ERISA § 514(a), 29 U.S.C. § 1144(a) 3, 6, 7, 12, 18

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit, entered on September 7, 2001, and reported at 265 F.3d 811, appears in the Appendix of both petitioners' papers at pages 1a-20a.[1] The opinion of the district court is unreported. 21a-22a.

JURISDICTION

Respondents agree with the petitioners' statement of this Court's jurisdiction.

STATUTORY PROVISIONS INVOLVED

1. Section 1441(b) of Title 28 of the United States Code states in relevant part:

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties.

[1] The defendants in this case filed two petitions (Docket No. 01-1179 and Docket No. 01-1187), seeking review of the same decision of the Court of Appeals for the Ninth Circuit. Respondent note holders Julio Abraham, *et al.* file this one opposition to both petitions. Respondents' citations are to the opinions of the Court of Appeals and the district court as reproduced in the appendices of both petitioners (which are identically numbered).

2. Section 502(a) of the Employee Retirement Income Security Act, ("ERISA"), 29 U.S.C. § 1132(a), states in relevant part:

> A civil action may be brought – . . . (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title; (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

3. Section 409(a) of ERISA, 29 U.S.C. § 1109(a), incorporated by reference into § 502(a)(2), states in relevant part:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

4. Section 514(a) of ERISA, 29 U.S.C. § 1144(a), states in relevant part:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

COUNTER-STATEMENT OF THE CASE

In *Abraham v. Norcal Waste Systems, Inc.*, 265 F.3d 811 (9th Cir. 2001), the United States Court of Appeals for the Ninth Circuit properly held that none of the state law claims in respondents' state court complaint was completely preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* Based on both its reading of the respondents' state court complaint and well established principles of ERISA preemption jurisprudence, the Ninth Circuit held that the state law claims did not meet either of the two requirements for original federal question jurisdiction under *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 64-66 (1987): (1) respondents' claims did not fall within the scope of ERISA's civil enforcement scheme, § 502(a), 29 U.S.C. § 1132(a) ("displacement"), and (2) respondents' claims were not preempted by ERISA, § 514(a), 29 U.S.C. § 1144(a) ("conflict preemption").

A. Facts.

This case is about an agreement to sell stock and the breach of duties that arose from that agreement. Until 1986, petitioner Norcal Solid Waste Systems, Inc. ("Norcal"), was an employee-owned garbage company. In December 1986, respondents, one hundred and forty-seven former employee-shareholders (or their heirs and assigns) of Norcal (the "note holders"), sold their stock to petitioner Norcal Waste Systems, Inc. Empioyee Stock Ownership Plan and Trust ("Norcal ESOP" or "Norcal") as part of a leveraged buyout. In return, each respondent received cash and a note issued under a trust indenture agreement (the "Indenture") between the Norcal ESOP and Security Pacific National Bank, the predecessor of petitioner Bank of America ("Bank"), who acted as the Indenture Trustee. 3a.

Under the Indenture, Norcal's ESOP was required to redeem the notes before it could consolidate, merge, or substantially transfer assets. 4a (quoting Indenture § 10-2). However, in December 1987, Norcal completed a transaction with Envirocal, Inc., whereby the Norcal ESOP and the Envirocal ESOP combined to form a single entity without redeeming the notes and the Bank failed to enforce the note holders' redemption rights. 4a-5a.

B. Complaint And Proceedings.

In July 1994, the note holders filed this lawsuit in California state court against the Bank, Norcal, the Norcal ESOP, and fourteen other defendants. In their complaint, the note holders alleged only state law causes of action, including fraud, breach of contract, tortious interference

with contract, negligence, breach of fiduciary duty, and unjust enrichment. The complaint sought relief on the basis of the note holders' reliance in tendering their Norcal shares to the ESOP, the default on their notes, and the Bank's failure to enforce redemption of their notes at the time of the Envirocal transaction. 18a-19a.

Defendants removed, alleging that forty-four of the (one hundred and forty-seven) note holders were participants in the Norcal ESOP and three of their thirteen causes of action were completely preempted by ERISA. The district court denied the note holders' motion for remand, holding that there was federal subject matter jurisdiction as to the three claims of the forty-four note holders and exercising supplemental jurisdiction over all the other note holders and all the other claims. 21a-22a. The district court never addressed the determinative jurisdictional question whether the state law claims fell within the scope of ERISA's civil enforcement provision. 22a. After a partial settlement in 1995, resolving the note holders' claims against all defendants except the Bank, and after a trial, the note holders appealed to the Court of Appeals for the Ninth Circuit arguing, among other things, that the district court lacked subject matter jurisdiction.

C. Court Of Appeals' Decision.

The Court of Appeals vacated the judgment, holding that the district court lacked subject matter jurisdiction and therefore removal had been improper. Following *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987), the Court of Appeals explained that removal would have

been proper only if: (1) ERISA preempted the state law cause of action under § 514(a), 29 U.S.C. § 1144(a) ("conflict preemption"); and (2) the cause of action was encompassed by ERISA's civil enforcement provision, § 502(a), 29 U.S.C. § 1132(a) ("displacement"). 9a. The Court held that neither requirement was met. *Id.* As the Court explained:

> Plaintiffs brought suit based on state law theories of fraud, breach of fiduciary duty, and negligence that cannot be said to "relate to" an ERISA plan within the meaning of 29 U.S.C. § 1144(a); nor are the claims encompassed within the scope of ERISA's civil enforcement provision, 29 U.S.C. § 1132(a). It is of no consequence that some Plaintiffs were also employees of the plan sponsor and plan participants at the time of suit because the claims have nothing to do with their status as such. Like all Plaintiffs, the ESOP participants brought suit in state court solely in their capacity as former shareholders and current note holders pursuant to the terms of the Indenture. Thus, the state law claims have no bearing on any ERISA-governed relationship and are not displaced by ERISA's civil enforcement scheme.

20a.

1. Conflict Preemption.

Applying the two prong complete preemption test, the Court first addressed conflict preemption under § 514. Noting that the "relevant state law certainly does not act immediately or exclusively on an ERISA plan," the Court explained that the question was whether the state laws claims have a "connection with" ERISA.

10a-11a. Discussing *California Division of Labor Standards Enforcement v. Dillingham Constr. N.A., Inc.*, 519 U.S. 316, 324-25 (1997), and quoting *Egelhoff v. Egelhoff*, 532 U.S. 141, 147 (2001), the Court explained that "to determine whether a state law has the forbidden connection, we look both to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood to survive, as well as the nature and effect of the state law on ERISA plans." 10a-11a. The Court then addressed in detail petitioners' arguments that § 514(a) preempted the state law claims because they allegedly infringed upon certain ERISA-regulated relationships between: (1) the plan and parties in interest; (2) the plan and participants; and (3) the plan and fiduciaries. 11a-17a. The Court found that none of these ERISA relationships was affected by the state law claims because the claims were based on the parties' non-ERISA relationships, that is the relationship of debtor – creditor and former shareholder, which have nothing to do with ERISA or the purposes of ERISA preemption. 9a-17a.

More specifically, the Court found the fact that forty-four of the one hundred and forty-seven note holders were participants in the ESOP was irrelevant to their state court claims because none of the note holders and none of their claims sought redress for any rights or obligations conferred by ERISA or challenged any conduct regulated by ERISA. 12a. The claims were not, the Court held, related to, let alone based on ERISA's rules prohibiting transactions between the plan and the parties in interest – the basis for the petitioners' argument that this ERISA-regulated relationship was somehow infringed by the claims. 12a. Rather, the Court found that, based on the

claims actually asserted in the state court action, "the ESOP's relationship with Plaintiffs who were also Norcal employees was no different from its relationship with the rest of the Plaintiff note holders." 13a.

Under similar reasoning, the Court of Appeals also found that the claims did not encroach upon the relationship between the plan and the participants. 13a-15a. Here again, the Court rejected the contention that the note holders' claims implicated ERISA or overlapped with the claims the participant note holders could make under ERISA. As the Court of Appeals emphasized, "[t]he claims of fraud, breach of fiduciary duty, and negligence arise from that status as note holders, and do not 'touch on' the status of the ESOP as a benefit plan or of any Plaintiffs as participants in that plan *(or on any claim the participants may make against the plan in that capacity)*." 13a-14a (emphasis added); *see also* 15a ("The rights and duties under state law between the ESOP and the note holders, whether ESOP participants or not, are distinct from any ERISA-governed relationship between a plan and its participants.").

Finally, the Court determined that the claims did not encroach upon the relationship between the plan and the plan's fiduciaries. Recognizing that "[p]laintiffs brought suit in their capacity as note holders pursuant to the terms of the Indenture, which by its own terms is governed by California law," the Court observed that "the state law claims here did not arise from transactions directly relating to plan benefits or administration." 16a. Rather, "[t]he conduct at issue concerned the acquisition of Norcal shares for restricted notes and a subsequent failure to redeem those notes." *Id.* "As such, the only

impact that the state law duties might have had on the plan or its beneficiaries is an indirect economic burden . . . insufficient for conflict preemption." *Id.* Additionally, the Court recognized that certain defendants – who were also plan fiduciaries – were not being sued for actions taken in that capacity, but were being sued "as the agents of the ESOP corporate entity that obtained Norcal shares from Plaintiff note holders." *Id.*

Based on its analysis that, in fact, the state law claims "have nothing to do with benefits, the administration of a benefit plan, or any duties imposed by ERISA" and that "[n]o ERISA-regulated relationship is encroached upon by the state law claims," the Court concluded that there was "no basis to find conflict preemption under ERISA." 17a.

2. Displacement.

Addressing complete preemption's second prong, § 502(a), ERISA's civil enforcement provision, the Court rejected the petitioners' argument that the note holders' claims fell within the scope of subsections (a)(2) or (a)(3), which permit suits to redress an ERISA violation or to enforce the terms of the plan or the provisions of ERISA. The Court explained:

> The claims asserted by all Plaintiffs in the state court action, however, do not fall within the scope of § 1132(a) because those claims are based upon rights that arise under state law in their capacity as former shareholders of Norcal and current note holders under the Indenture, *not upon any rights that are conferred, enforced, or*

governed by ERISA (nor upon a violation of the terms of a plan).

18a (emphasis added).

The Court's holding was based on the simple facts that the claims "seek relief for all plaintiffs on the basis of their reliance in tendering their Norcal shares to the ESOP, the eventual default on their notes and the failure to redeem or enforce redemption," and none of the "claims derive from 'any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter' " of ERISA. 19a (quoting § 409, 29 U.S.C. § 1109, which is incorporated into § 502(a)(2) by reference). Moreover, the Court explained, none of the plaintiffs "seek[s] relief as a participant, beneficiary, or fiduciary to enjoin any act or obtain any other equitable relief to redress any violations or enforce any provisions of ERISA." *Id.* (quoting *Toumajian v. Frailey*, 135 F.3d 648, 656 (9th Cir. 1998)). In finding that the claims also "do not concern any plan fiduciaries in their capacity as such," the Court concluded that "none of the state law claims can be characterized as fiduciary breach claims within the scope of ERISA's civil enforcement provision." *Id.*; *see also id.* ("Simply put, the claims do not concern any plan fiduciaries in their capacity as such."). Accordingly, the Court of Appeals held that claims did not fall within the scope of ERISA's civil enforcement provision.

REASONS FOR DENYING THE WRIT

The petitioners offer no "compelling reasons" for review and the petitions should be denied because the

decision of the Court of Appeals for the Ninth Circuit is based on the proper application of the well settled jurisdictional rule of *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987), to the particular state law claims in this case. Petitioners' disagreement with the Court of Appeals' application of the rule and factual analysis of the claims does not merit review. And while petitioners attempt to identify alleged conflicts between the Court's decision and the decisions of five other Courts of Appeals – from the Second, Third, Sixth, Seventh, and Eighth Circuits – in fact, none of the cases identified by petitioners presents any actual conflict. At most, the petitioners do no more than complain, without merit, of "erroneous factual findings or the misapplication of a properly stated rule of law," reasons that rarely justify review. Sup. Ct. R. 10. This case is no exception and review should be denied.

Petitioners' "questions presented" and the asserted conflicts are false because they are premised on mischaracterizations of the Ninth Circuit Court of Appeals' decision and reasoning. Moreover, petitioners virtually ignore the determinative jurisdictional issue identified in *Metropolitan Life* – whether any of the note holders' state law claims are within the scope of ERISA's civil enforcement provisions. Lacking any substantial argument on this controlling issue, petitioners instead devote essentially all of their attention to the non-jurisdictional issue of conflict preemption which, as petitioners concede, cannot alone justify removal or create a proper basis for subject matter jurisdiction. *See* Norcal Pet. at 6-7; Bank Pet. at 3-4.

With no substantial argument on the key displacement issue and only illusory conflicts and mere disagreements with the Ninth Circuit Court of Appeals' application of *Metropolitan Life* to the particular facts presented to go on, the petitioners fail to present any valid reason for this Court to grant the writ.

A. The Holding That The Note Holders' Claims Fall Outside The Scope Of ERISA's Civil Enforcement Provisions Does Not Conflict With The Decision Of Any Other Court Of Appeals And Is Entirely Correct.

In *Metropolitan Life*, 481 U.S. at 64-66, this Court drew a distinction between claims that are preempted by ERISA § 514(a), 29 U.S.C. § 1144(a) ("conflict preemption"), and claims that fall within the scope of § 502(a), 29 U.S.C. § 1132(a) ("displacement"). "Conflict preemption" means that ERISA provides a federal defense, but does not establish original federal jurisdiction permitting removal. *See Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust For Southern Cal.*, 463 U.S. 1, 25-27 (1983). Only when a claim also "falls within the scope" of § 502(a) is it converted from an "ordinary state common law complaint into one stating a federal complaint for the purposes of the well-pleaded complaint rule." *Metropolitan Life*, 481 U.S. at 65. Accordingly, the "displacement" prong of the complete preemption analysis is absolutely necessary for federal jurisdiction.

Guided by the statutory language and Ninth Circuit precedents (which petitioners do not challenge), the Court of Appeals correctly held that the note holders'

claims did not fall within the scope of § 502(a)(2) or (a)(3), the two civil enforcement provisions petitioners relied upon, because none was premised "upon any rights that are conferred, enforced, or governed by ERISA (nor upon any violation of a plan)." 18a.[2]

The Court's analysis is clearly correct. All the note holders, including the forty-four who also were ESOP participants, requested relief only for breaches of "rights that arise under state law in their capacity as former shareholders of Norcal and current note holders under the Indenture." 18a. The note holders sought relief solely on the basis of their reliance in tendering their Norcal shares to the ESOP, the default on the notes, and the failure to enforce redemption. 19a. The state court complaint did not state an ERISA cause of action, require any review of the terms of the ERISA plan or request ERISA relief, such as plan benefits or the clarification of future benefits under the plan. Moreover, none of the claims alleged any violation of duties imposed by ERISA on fiduciaries. Thus, the Court properly found that "none of the state law claims can be characterized as fiduciary

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[2] Petitioners do not dispute that the one hundred and forty-seven note holders each had exactly the same state court claims and that one hundred and three of the note holders (*i.e.*, those who were not ESOP participants) had no standing under ERISA and could not possibly bring a claim within the scope of ERISA's civil enforcement provisions. Petitioners fail to explain how some note holders' claims were indisputably not displaced while the exact same claims of other note holders were (under the petitioners' theory). The Court of Appeals' decision that none of the note holders' claims was completely preempted properly treats like claims alike.

breach claims within the scope of ERISA's civil enforcement provision." 19a. As the Court of Appeals aptly stated: "[s]imply put, the claims do not concern any plan fiduciaries in their capacity as such." *Id.* This holding was plainly correct. *See Peacock v. Thomas*, 516 U.S. 349, 353 (1996) (holding that subject matter jurisdiction did not exist because lawsuit did not allege a violation of ERISA or of the plan).

1. The Court Of Appeals' Holding That The Claims Fall Outside The Scope Of ERISA's Civil Enforcement Provisions Does Not Conflict With The Decision Of Any Other Court Of Appeals.

Not only is the Court of Appeals' decision correct but also, contrary to petitioners' arguments, it is fully consistent with the decisions of the other Courts of Appeals. In fact, the only case cited by petitioners (and even then, only by the Bank) as presenting any conflict, *Smith v. Provident Bank*, 170 F.3d 609, 612-14 (6th Cir. 1999), is factually inapposite and thus does not conflict with the Court of Appeals' decision. Indeed, *Smith* recognizes the rule, as does the Court of Appeals, that "the definition of a fiduciary under ERISA is a functional one." *Id.* at 613. However, as a factual matter the Court of Appeals for the Sixth Circuit in *Smith* found that, unlike this case, the plaintiff's claim was based on defendant's conduct as an ERISA fiduciary. Moreover, the plaintiff in *Smith* sought "recovery of [plan] benefits," leading the Court to conclude that the plaintiff, as a plan participant, sought "to clarify his rights to future benefits under the terms of the plan." *Id.* at 613-14. The plaintiff's claim in *Smith* to

recover benefits or clarify his future entitlement to plan benefits against a plan fiduciary based on breach of fiduciary duties imposed by ERISA clearly falls within the express scope of ERISA's civil enforcement provisions and distinguishes *Smith* from this case. *See* 29 U.S.C. § 1132(a)(1)(B) (providing action "to recover benefits due . . . under the terms of the plan"). Accordingly, the Court of Appeals' decision is not in conflict with *Smith*.[3]

For its part, Norcal fails to even develop a separate argument on the displacement issue. While Norcal admits that a claim can be brought under ERISA only "if it was within the scope of one of the civil enforcement provisions of Section 502," it limits its discussion of subsections 502(a)(2) and (a)(3) to a single footnote. *See* Norcal Pet. at 14 n.5. By so minimally discussing this key issue, Norcal essentially concedes that the Ninth Circuit's decision is not in conflict with a decision of any Court of Appeals.

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[3] In a misguided effort to manufacture a conflict on the displacement issue, the Bank lifts a single sentence quote from *Smith* ("[a] claim for breach of fiduciary duty against the fiduciary of an ERISA plan *necessarily* presents a federal question," Bank Pet. at 18 (quoting *Smith*, 170 F.3d at 614) (petitioner's emphasis)), implying that the Court of Appeals' decision is contrary to the law in the Sixth Circuit. When read in context, however, and given that the definition of an ERISA fiduciary is a functional one, it is clear that the quoted language in *Smith* means only that *if the ERISA fiduciary is acting as such* and its actions in that respect give rise to a claim by a person with standing to sue under ERISA, such claim falls within ERISA's civil enforcement provisions, § 502(a). Norcal's discussion of *Smith* recognizes this inherent limitation. *See* Norcal Pet. at 20.

Instead, as set forth below, Norcal takes an equally insupportable tack, arguing that the Court of Appeals' "dual capacity" analysis is flawed, while conceding elsewhere that this Court has recognized the very same rule, *i.e.*, "not all acts of a fiduciary who is for some purposes an ERISA fiduciary are fiduciary acts regulated by ERISA." Norcal Pet. at 13 (citing *Pegram v. Herdrich*, 530 U.S. 211, 225 (2000)).

2. Petitioners Distort The Court Of Appeals' Holding.

Petitioners acknowledge the rule that a party may "wear two hats" and act in differing capacities that may expose them to regulation under either ERISA or state law depending on the nature of the act. *See* Norcal Pet. at 13 (citing *Pegram v. Herdrich*, 530 U.S. at 235 (citing *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 443-44 (1999) (holding that ERISA's fiduciary requirements do not apply to a plan settlor's decision on terms or structure of plan))). Petitioners' arguments boil down to the assertion that the Court of Appeals' decision improperly permits the note holders to have an "alternative theory of liability" under both ERISA and state law arising from the "same acts." *See* Norcal Pet. at 13-14; Bank Pet. at 15-16. Petitioners are wrong; the Court of Appeals' opinion says no such thing. As the Court clearly explains, the state court claims are not alternative theories of liability for violations of ERISA; to the contrary, the claims do not arise from the same acts that would give rise to liability under ERISA. As the Court stated:

> The claims of fraud, breach of fiduciary duty, and negligence arise from [plaintiffs'] status as note holders, and do not "touch on" the status of the ESOP as a benefit plan or of any Plaintiffs as participants in the plan *(or on any claim the participants may make against the plan in that capacity)*.

14a (emphasis added); *see also* 16a ("The conduct at issue concerned the acquisition of Norcal shares in exchange for restricted notes and a subsequent failure to redeem those notes.").

As the Court made perfectly clear, the note holders' state court claims had "nothing to do with benefits, the administration of a benefit plan, or any duties imposed by ERISA," 17a, or anything to do with the claims asserted in the separate federal suit brought by the forty-four ESOP participants. 12a-13a, 16a, 18a, 20a.

Having conceded that "ERISA allows a party to act as a fiduciary toward a plan's beneficiaries in some transactions and to act as a non-fiduciary, with divergent or even adverse interests, in others," Norcal Pet. at 13, Norcal's entire argument collapses and cannot be revived even by its repeated attempts to mischaracterize the Court of Appeals' factual analysis of the claims and actual holding.

Petitioners' reliance on the fact that forty-four of the note holders, in their distinct capacity as ESOP participants, also filed a separate action in federal court under ERISA is misplaced. Unless the claim actually asserted in the state court action is, in reality, a claim arising under federal law, mere standing of some of the note holders to

assert a federal claim does not create federal jurisdiction. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 398-99 (1987).

Consistent with this Court's precedent, the Ninth Circuit properly found that none of the note holders, including those who also were ESOP participants, alleged any claims in this case arising under ERISA. The petitioners fail to present any basis to challenge the Ninth Circuit's holding. Without a question worthy of *certiorari* on this essential element of the complete preemption test, the petitions should be denied. *See Franchise Tax Bd.*, 463 U.S. at 7 (holding that removal was improper and therefore not reaching the merits of the ERISA conflict preemption issue).

B. The Holding That The Note Holders' Claims Are Not Conflict Preempted Does Not Conflict With The Decision Of Any Other Court Of Appeals And Is Entirely Correct.

Review of the petitioners' arguments and cases shows that the Court of Appeals' conflict preemption analysis under § 514(a), which followed this Court's analysis in *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 519 U.S. 316 (1997), and *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001), is not in conflict with any other Circuit. 10a-11a. Instead, the only conflicts alleged by petitioners are illusory. They are premised either on their disagreement with the Court of Appeals' factual analysis of the state court claims or a mischaracterization of the Court's reasoning.

1. The Court Of Appeals' Decision Does Not Conflict With The Decision Of Any Other Court Of Appeals.

Norcal contends that the Court of Appeals' decision conflicts with the decision in *General American Life Insurance Co. v. Castonguay*, 984 F.2d 1518 (9th Cir. 1993), a case that the Court considered and distinguished. 15a-17a; Norcal Pet. at 17-19. But this alleged conflict is merely a disagreement with the Court's factual analysis of the claims and the application of the well-settled rule of decision to these particular claims. In distinguishing *Castonguay*, the Court explained that the note holders' claims did not relate directly to plan benefits or plan administration, but created, at most, an indirect economic burden. 16a. *See also Cal. Div. of Labor Standards*, 519 U.S. at 334 (holding that "prevailing wage statute alters the incentives, but does not dictate the choices facing ERISA plans" and therefore is not preempted); *N.Y. State Conf. of Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 668 (1995) (finding insufficient economic effect on administration for preemption).

In fact, *Castonguay* supports the decision in this case. As the Court explained, ERISA does not "regulate those relationships where a plan operates like any other commercial entity – for instance, the relationship between the plan as its own employees, *or the plan and its insurers or creditors.*" 13a (emphasis in original) (quoting *Castonguay*, 984 F.2d at 1521-22). *See also Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 832 (1988) (explaining that ERISA plans will be subject to suits under § 502 as well as a "second type of civil action . . . for run-of-the-mill state law claims such as unpaid rent, failure to pay

creditors . . . [that] are relatively commonplace."). Thus, it is well recognized that the relationship between the plan and a creditor may fall outside the scope of ERISA preemption. The petitioners have established no basis to question that conclusion here. *See Lordmann Enterprises, Inc. v. Equicor, Inc.*, 32 F.3d 1529, 1532-34 (11th Cir. 1994); *Hospice of Metro Denver, Inc. v. Group Health Ins.*, 944 F.2d 752, 754-56 (10th Cir. 1991).

In addition, neither *Smith v. Provident Bank, Inc.*, discussed above, nor *Glazier & Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Securities Inc.*, 93 F.3d 1171, 1185 (3d Cir. 1996), stands for the petitioners' overly broad view that "when ERISA regulates a plan, it occupies the field of duties of care regarding the plan – fiduciary or other – and leaves no room for state law duties between the parties thereto." Norcal Pet. at 20. Petitioners' argument ignores this Court's decision in *Pegram* and would make ERISA the source of law for all possible claims between ESOP participants and their employer – which it clearly is not. *See Egelhoff*, 532 U.S. at 146 ("[W]e have recognized that the term 'relate to' cannot be taken 'to extend to the furthest stretch of its indeterminacy,' or else 'for all practical purposes preemption would never run its course.' ") (quoting *Travelers*, 514 U.S. at 655).

Petitioners' argument also ignores the material differences between the claims in *Smith* and *Glazier* and the note holders' claims here. *Smith* and *Glazier* addressed entirely different claims. As noted above, the plan participant in *Smith* asserted a claim against an ERISA fiduciary for plan benefits arising from the mismanagement of the participant's plan assets. *See Smith*, 170 F.3d at 612-14.

The Court of Appeals' opinion in *Glazier*, which does not even address complete preemption, offers even less support for petitioners' argument. Unlike this case, the action in *Glazier* was brought by an ERISA plan to recover the loss of plan assets against a party alleged to have acted as an ERISA fiduciary in causing the loss. The Third Circuit reversed the district court's decision that the state law claims were conflict preempted under ERISA and remanded for the district court to determine whether the defendant was acting as an ERISA fiduciary when it allegedly caused the loss. *See Glazier*, 93 F.3d at 1182. This in no way conflicts with the Court's conclusion here that the note holders' claims exist "irrespective of the status of any of the Defendants as fiduciaries of an ERISA plan," and "do not concern any plan fiduciaries in their capacity as such." 19a.

The petitioners' other cases are similarly inapposite and overstated. The Bank cites to two cases from the Second Circuit for the unremarkable and inapposite proposition that "alternative state law theories for conduct actionable under ERISA" are preempted. *See* Bank Pet. at 16 (citing *LoPresti v. Terwilliger*, 126 F.3d 34, 41 (2d Cir. 1997) ("This common law conversion claim to recover losses to the Funds is nothing more than an alternative theory of recovery for conduct actionable under ERISA and as such is preempted by ERISA.") (internal quotations omitted), and *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 288 (2d Cir. 1992) (alleging failure to fund the plan according to plan's terms)). The Bank also erroneously suggests a parallel between *LoPresti* and this case by miscasting the Court's opinion, which affirmatively rejected the view that the claims in this case

involved plan assets in the manner meant by *LoPresti*, a suit alleging that the defendants converted funds that belonged to the plan. *See LoPresti*, 126 F.3d at 37; Bank Pet. at 16.

Norcal cites two cases that involved suits against plan administrators for the denial of benefits for the proposition that claims cannot be stated on "parallel state law relationships," Norcal Pet. at 23-24 (citing *Hull v. Fallon*, 188 F.3d 939, 943 (8th Cir. 1999), *cert. denied*, 528 U.S. 1189 (2000), and *Jass v. Prudential Health Care Plan, Inc.*, 88 F.3d 1482 (7th Cir. 1996)), and two employment cases for the view that suits cannot be maintained on the basis of "dual capacities," Norcal Pet. at 22-23, 23 n.12 (citing *Smith v. Dunham-Bush, Inc.*, 959 F.2d 6, 8 (2d Cir. 1992), and *Bartholet v. Reishauer A.G. (Zurich)*, 953 F.2d 1073 (7th Cir. 1992)).[4] However, as with *LoPresti* and *Diduck*, the courts' analysis in each case was premised on the conclusion that the claim was, in fact, a claim for benefits under ERISA and therefore the courts found the state law claim preempted on that basis. *See Hull*, 188 F.3d at 943 ("In short, although Hull's characterization of his claims sound in medical malpractice, the essence of his claim rests on the denial of benefits."); *Dunham-Bush, Inc.*, 959 F.2d at 12 ("Ultimately, Smith is no different from any other plan participant suing for added benefits under a

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[4] Norcal also argues that *Dunham-Bush, Inc.* and *Bartholet* are relevant because they establish that ERISA can preempt contract claims arising from contracts that predate the ERISA relationship. *See* Norcal Pet. at 22-23, 23 n.12. However, the Court of Appeals' decision here did not turn on the order in which the ESOP was created and the Indenture agreement signed, which makes Norcal's argument superfluous.

claim that the employer promised additional monies to the participant."). These cases, therefore, do not stand for the legal rule that all state law claims between possible ERISA parties must be preempted, or completely pre-empted, as petitioners suggest. They are not in conflict with the rule applied by the Court of Appeals in this case in light of the Court's determination that the state law claims were legally and factually distinct from any claims that could be brought under ERISA.

2. Contrary To The Bank's Argument, The Court Did Not Hold That ESOPs Are Excluded From ERISA Coverage.

In an effort to create a conflict, the Bank mischaracterizes the Court of Appeals' opinion. Contrary to the Bank's assertion, the Court of Appeals' decision is not tantamount to a rule that all transactions subject to ERISA's statutory exemptions are necessarily or for all purposes "outside of the scope of ERISA." Bank Pet. at 14.

Additionally, the Court's decision – that none of the alleged ERISA-regulated relationships was infringed by the claims – a conclusion the Court reached based on its factual analysis of the note holders' complaint – was not, as the Bank alleges, "grounded" merely on the fact that the transaction giving rise to the issuance of the notes by the ESOP was an "exempt" transaction. Bank Pet. at 13. In fact, the Court discussed the exemption from the prohibited transaction rules in one part of its conflict

preemption analysis, which addressed one of the three ERISA-regulated relationships that petitioners argued were infringed by the claims. The Court explained:

> [T]he state law claims alleged in the initial complaint did not implicate the prohibited transaction provision, which serves ERISA's purposes by protecting a plan's participants and beneficiaries from a depletion of plan assets through shady, inside deals. Indeed, the claims do not remotely concern the objectives of ERISA.

12a (citations and quotations omitted).

For this reason, the Court of Appeals concluded that the status of some note holders as "parties in interest" was irrelevant to their claims as note holders. 12a-13a. The fact that the claims were based on notes issued in a transaction that was exempt from ERISA's prohibited transaction provision only added additional support for the Court's conclusion that the note holders' claims did not improperly infringe upon any ERISA-regulated relationship.

Indeed, the Court of Appeals contrasted this case with its decision in *Rutledge v. Seyfarth, Shaw, Fairweather, & Geraldson*, 201 F.3d 1212, 1222 (9th Cir.), *amended by* 208 F.3d 1170 (9th Cir.), *cert. denied*, 531 U.S. 992 (2000), where, unlike this case, the claims were premised on an ERISA-regulated relationship between the plan and a party in interest "in the very respects governed by ERISA's regulation of prohibited transactions." 12a. The difference, as noted by the Court of Appeals, is that the note holders' claims in this case "do not remotely concern the objectives of ERISA," and as a result, "do not bear upon any ERISA-governed relationship." *Id.* The Court of

Appeals' factual analysis of the note holders' claims and the decision that *those claims* are not preempted cannot support the Bank's characterization of the decision as promulgating a rule that "*transactions* subject to ERISA's statutory exemptions are outside the scope of ERISA." Bank Pet. at 14 (emphasis added).

Moreover, even allowing for the Bank's shading of the Court of Appeals' decision, the cases relied upon by the Bank to demonstrate an alleged conflict do not support its argument. In fact, in *Martin v. Feilen*, 965 F.2d 660 (8th Cir. 1992), the Court of Appeals for the Eighth Circuit rejected the "sweeping approach" to ERISA preemption that the petitioners rely on here. *See Feilen*, 965 F.2d at 665-66. Like the Court of Appeals' factual analysis of the note holders' claims, the Court in *Feilen* explained that a specific analysis of the challenged transactions was necessary in order to determine whether they "sufficiently involved the ESOP to implicate ERISA fiduciary duties." *Id.* at 665. Moreover, *Feilen* is consistent with the Court of Appeals' analysis in recognizing that ESOP fiduciaries are "not subject to ERISA's fiduciary duty requirements [for actions] made in their capacity as corporate officers, not as plan administrators." *Id.* at 666. Clearly, there is no conflict with *Feilen*.

The Bank's other case, *Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995), is similarly unrelated and also does not conflict with the Court of Appeals' decision. In *Moench*, the Court of Appeals for the Third Circuit held that ERISA fiduciaries could be liable for failing to diversify ESOP plan assets even though ESOPs are permitted to hold non-diversified portfolios. *See Moench*, 62 F.3d at 569-70. *Moench*, therefore, stands for the proposition, not

relevant here, that when the suit involves a violation of ERISA's fiduciary duties, an exemption may not provide a complete merits defense. More telling, however, is the Third Circuit's agreement in *Moench* with the principle, relied on by the Court of Appeals in this case, that fiduciary status is not an "all or nothing" concept. *Id.* at 561. In particular, *Moench* noted the rule, followed by the Court of Appeals here that, "[a] court must ask whether a person is a fiduciary with respect to the particular activity in question." *Id.* In this case, the note holders' complaint did not allege violations of ERISA fiduciary duties, or any other right created by ERISA. The Court of Appeals, therefore, correctly rejected petitioners' argument that the note holders' claims were preempted merely because the notes were issued in an exempt transaction. Instead, the Court analyzed the note holders' claims and found that they did not involve the ESOP fiduciaries in their capacity as such. 16a. Neither *Moench* nor *Feilen* is to the contrary.

* * *

As a last ditch argument, the Bank suggests that a writ of *certiorari* "may" be appropriate in light of *Moran v. Rush Prudential HMO, Inc.*, 230 F.3d 959 (7th Cir. 2000), *cert. granted*, 121 S. Ct. 2589 (2001), because "the Seventh Circuit held that the case was properly removed even though the claim was not *preempted* by ERISA." Bank Pet. at 19 (emphasis added).[5] *Moran* has no application to this

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[5] In this discussion, the Bank also cites *Buce v. Allianz Life Ins. Co.*, 247 F.3d 1133 (11th Cir. 2001). However, *Buce* did not hold that ERISA permitted removal of a case that was not preempted by ERISA. Rather, the question in *Buce* was whether

case as it involved a state law arguably falling within the insurance exception to ERISA preemption. In any event, the Bank's argument only serves to undermine petitioners' position by focusing the jurisdictional inquiry on the issue of displacement. If this Court were to adopt a rule of complete preemption that eliminated the element of conflict preemption, the decision in this case would be the same. As has been established, the claims in this case neither fall within the scope of an ERISA provision that the note holders can enforce via § 502(a), nor require an interpretation of a contract governed by federal law as the Seventh Circuit's test requires. *See Moran*, 230 F.3d at 967.

CONCLUSION

The petition of Bank of America and the petition of Norcal Waste Systems, Inc. and Norcal Waste Systems, Inc. Employee Stock Ownership Plan and Trust fail to present any issue worthy of review. Petitioners' arguments come from their disagreement with the Ninth Circuit Court of Appeals' analysis of the removed complaint and mischaracterizations of the Court's opinion. The Court of Appeals' decision is correct and does not conflict

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the Court could look to state law to interpret the terms of an ERISA-governed insurance plan when the insurance policy included a choice of law provision. *See Buce*, 247 F.3d at 1148; *see id.* at 1150 (Barkett, J., concurring) ("The question before this Court is whether ERISA precludes the parties to an agreement from using state law to define an ERISA contract's terms. In the absence of any compelling rationale to the contrary, I am not persuaded that ERISA sweeps so broadly.").

with the decision of any other Circuit. Accordingly, the petitions should be denied.

Respectfully,

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No. 01-1187

IN THE

Supreme Court of the United States

NORCAL WASTE SYSTEMS, INC. and NORCAL WASTE SYSTEMS, INC. EMPLOYEE STOCK OWNERSHIP PLAN AND TRUST,

Petitioners,

v.

JULIO ABRAHAM, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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169

STATEMENT PURSUANT TO RULE 29.6

The corporate disclosure statement of Petitioner Norcal Waste Systems, Inc. was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

TABLE OF CONTENTS

	Page
Statement Pursuant to Rule 29.6	i
Table of Contents	ii
Table of Cited Authorities	iv
Introduction	1
Arguments in Reply	2
A. Because The Plan Participants' Claims Against The Plan Fiduciaries Relate To The Plan (And Thus Are "Conflict Preempted"), Those Claims Necessarily Fall Within ERISA's Civil-Enforcement Scheme And Are "Displaced."	2
B. The Ninth Circuit's "Conflict Preemption" Holding Conflicts With The Law In Five Other Circuits, And Respondents Cannot Explain Away That Conflict.	6
1. As The Opinion Below Makes Clear, The Conduct On Which Plaintiffs Based Their Claim That The ESOP Fiduciaries Breached State Law Fiduciary Duties Consisted Largely Of ERISA-Regulated Fiduciary Acts.	6
2. Respondents' Efforts To Distinguish The Other Circuits' Opinions Mischaracterize Both Those Opinions And The Petition's Argument.	8

Contents

Page

C. Respondents Concede That The Issue Presented Is Of Nationwide Importance, Warranting This Court's Review. 9

Conclusion 10

TABLE OF CITED AUTHORITIES

Page

Cases:

Danca v. Private Health Care Sys., Inc., 185 F.3d 1 (1st Cir. 1999) 3

Jass v. Prudential Health Care Plan, Inc., 88 F.3d 1482 (7th Cir. 1996) 4

Metro. Life Ins. Co. v. Taylor, 481 U.S. 58 (1987) ... 3

Pegram v. Herdrich, 530 U.S. 211 (2000) 6, 8, 9

Rice v. Panchal, 65 F.3d 637 (7th Cir. 1995) 4

Smith v. Provident Bank, Inc., 170 F.3d 609 (6th Cir. 1999) 8, 9

Varity Corp. v. Howe, 516 U.S. 489 (1996) 5

Statutes:

29 U.S.C.

§ 1104(a)(1)(B) 4

§ 1132(a) 3,4,5

§ 1132(a)(1) 9

§ 1132(a)(2) 9

§ 1132(a)(3) 4,5,6,9

§ 1144(a) 3

Cited Authorities

Page

ERISA

§ 404(a)(1)(B) 4

§ 502(a) 3,4,5

§ 502(a)(1) 9

§ 502(a)(2) 9

§ 502(a)(3) 4,5,6,9

§ 514(a) 3

INTRODUCTION

The Petition demonstrated that the Ninth Circuit has created a critical circuit split on the issue of ERISA "conflict preemption" — a split that renders unclear the duties and potential liability of thousands of ERISA fiduciaries for acts of managing plan assets. In their opposition, Respondents mischaracterize Petitioners' argument and the opinion below and attempt to distinguish the conflicting opinions of five Circuits on irrelevant grounds.

Respondents do not dispute that there *would* be a circuit split meriting this Court's review if the Ninth Circuit *did* rule, as Petitioners contend, that a state law fiduciary breach claim can be based on fiduciary acts regulated by ERISA and yet escape "conflict preemption." Rather, Respondents attempt to show that the Ninth Circuit did not so hold. The attempt fails. The Ninth Circuit's published decision identified the claims at issue as based, at least in part, on decisions about investing plan assets made by the ESOP fiduciaries in a series of ESOP transactions — acts squarely regulated by ERISA. Pet. App. ("App.") 6a ("The alleged conduct underlying Plaintiffs' claims was a series of breaches, misrepresentations, omissions, concealment[s], and conflicts of interest by Defendants . . . in conjunction with the initial leveraged buyout, *the 1987 Envirocal transaction, and subsequent ESOP activities*" (emphasis added)).

The Ninth Circuit treated the underlying conduct as legally irrelevant because it found dispositive the fact that the ESOP Participants had not brought suit in their "capacity" or "status" as ESOP Participants (and the ESOP fiduciaries thus had not been sued in their ERISA capacity). This "dual capacity" analysis squarely conflicts with decisions in five other Circuits because it ignores a basic principle of ERISA fiduciary law articulated by this Court: while a party can function as an ERISA fiduciary in some acts and as a non-fiduciary in others, *each single act* is subject either to ERISA or to state law, not both. *See* Part B, *infra*.

Respondents also contend that the Ninth Circuit's "displacement" holding affords an independent basis to affirm the judgment even if its "conflict preemption" holding is reversed, and that Petitioners somehow overlooked or waived this issue. Opp. 14–18. This is incorrect. If the ESOP Participants' state law fiduciary breach claim against various ESOP fiduciaries does "relate to" an ERISA plan (the ESOP), then that claim *of necessity* falls within the scope of ERISA's civil enforcement provisions and is "displaced." *See* Part A, *infra*. The Petition made this point in a footnote because no more elaborate discussion was necessary.

In sum, the Ninth Circuit's "conflict preemption" holding conflicts with the law in five other Circuits. A reversal of that holding will lead inexorably to a reversal of the judgment. ERISA fiduciaries, when investing plan assets, should not be required to consider *both* their fiduciary duties under ERISA *and* their potentially conflicting fiduciary duties under state law. Respondents do not and cannot contest the critical importance of this issue to the nation's thousands of ERISA fiduciaries. *See* Part C, *infra*.

ARGUMENTS IN REPLY

A. Because The Plan Participants' Claims Against The Plan Fiduciaries Relate To The Plan (And Thus Are "Conflict Preempted"), Those Claims Necessarily Fall Within ERISA's Civil-Enforcement Scheme And Are "Displaced."

The Ninth Circuit's primary holding was that the ESOP Participants' claim was not subject to "conflict preemption" because the Participants sued in their capacity as noteholders, not plan participants (and because the ESOP fiduciaries thus were not sued in their capacity as ERISA fiduciaries). App. 11a–17a. Respondents' main argument in opposition addresses a different issue. Respondents contend that the Ninth Circuit's assertedly distinct "displacement" holding — that the ESOP Participants' breach of fiduciary duty claim did not fall

within ERISA's civil enforcement provisions — does not conflict with the law in any other Circuit, and that *this* lack of conflict precludes a grant of *certiorari*. Opp. 14–18.

Respondents are mistaken. To justify a grant of *certiorari*, Petitioners need not show that the Ninth Circuit's "displacement" holding creates a circuit split. Petitioners need only show that: (1) the "conflict preemption" holding creates a circuit split (as it does); and that (2) if this Court reverses that holding, the "displacement" holding will not afford an independent basis to affirm the judgment. As the Petition showed, the "displacement" and "conflict preemption" holdings rely on precisely the same reasoning. *See* Pet. 14 n.5. If one is reversed, the other will necessarily fall with it, dictating reversal of the judgment. Accordingly, nothing bars this Court's review of the circuit split created by the "conflict preemption" holding.

ERISA completely preempts a claim pled under state law if a court can recharacterize the claim as actually arising under the civil-enforcement provisions of ERISA Section 502(a). *See Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 62–64 (1987). This requires that the claim be of a sort authorized by Section 502(a) and be asserted by a plaintiff with standing to sue, against a defendant subject to suit, under that Section. *See id.* at 62–63 (identifying plaintiff, claim, and defendant). The Ninth Circuit has separated out a part of that analysis — the inquiry whether the claim "relates to" an ERISA plan (and thus would be preempted by Section 514(a)) — and made it a preliminary inquiry labeled "conflict preemption." *See* App. 9a. It treats the remaining requirements for complete preemption as a second inquiry labeled "displacement." *Id.*[1]

1. The Ninth Circuit's division of the analysis into two steps is a minority approach. Most Circuits recognize that complete preemption involves but one inquiry, *i.e.*, whether a claim pled under state law can be recharacterized as arising under ERISA Section 502(a). *See, e.g.*, *Danca v. Private Health Care Sys., Inc.*, 185 F.3d 1, 5 (1st Cir. 1999)

(Cont'd)

Within that framework, because the ESOP Participants' claims here "relate to" the ESOP, the remaining "displacement" inquiry is readily satisfied. Section 502(a)(3) authorizes plan participants to bring suit to recover individual equitable relief "to redress . . . violations" of "any provisions of [ERISA]" (29 U.S.C. § 1132(a)(3)), such as the provision imposing fiduciary duties on ERISA plan fiduciaries like the ESOP fiduciaries here. *See* 29 U.S.C. § 1104(a)(1)(B). As plan fiduciaries, the ESOP Committee members are proper defendants to such a claim; as participants, the ESOP Participants are proper plaintiffs. The Ninth Circuit acknowledged this. *See* App. 18a (proper plaintiffs), 19a (proper defendants).[2]

(Cont'd)

(citing opinions from four Circuits); *Jass v. Prudential Health Care Plan, Inc.*, 88 F.3d 1482, 1486–87 (7th Cir. 1996). In those Circuits, the Ninth Circuit's analysis of whether the claims "relate to" an ERISA plan (its "conflict preemption" analysis) would be part of the complete preemption analysis under Section 502(a); if the claims did not "relate to" a plan, they could not possibly fall within the scope of Section 502(a). *Cf. Rice v. Panchal*, 65 F.3d 637, 646 n.10 (7th Cir. 1995) ("Where a claim is completely preempted under §502(a) it is necessarily preempted under §514(a)."). Thus, within the analytic framework of most Circuits, the conflict shown in the Petition *is* a conflict about "complete preemption."

2. In contrast, the claims of the non–ESOP Participant plaintiffs are an example of claims that are preempted by ERISA but not *completely* preempted, because they are not brought by plaintiffs with standing to sue under ERISA — *i.e.*, participants, beneficiaries or fiduciaries. Respondents complain, in a footnote, that Petitioners "fail to explain how some note holders' claims [those of the non–ESOP Participant plaintiffs] were indisputably not displaced while the exact same claims of other note holders [the ESOP Participant plaintiffs] were." Opp. 13 n.2. But the same footnote flags the explanation. Claims can be recharacterized under Section 502(a) only if ERISA gives the plaintiff standing to sue (*see* p.3 *supra*), and the non–ESOP Participant plaintiffs, as Respondents note, "had no standing under ERISA and could not possibly bring a claim within the scope of [its] civil enforcement provisions." Opp. 13 n.2. The ESOP Participants could (and did).

The Ninth Circuit offered only one conclusory reason why, in its view, the ESOP Participants' claims did not arise under Section 502(a)(3)[3]: "none of these Plaintiffs seek[s] relief *as a participant*, beneficiary, or fiduciary to enjoin any act or obtain any other equitable relief to redress any violations or enforce any provisions of ERISA. . . . Simply put, the claims do not concern any plan fiduciaries *in their capacity* as such." App. 19a (quotation omitted, emphasis added) (paraphrasing ERISA § 502(a)(3)). But these statements, which are based on the *capacity* in which the ESOP Participants assertedly had sued (and the ESOP fiduciaries had been sued), do no more than reiterate the Ninth Circuit's analysis of why the claims did not "relate to" the ESOP and thus were not subject to "*conflict preemption*" — the *first* prong of the Ninth Circuit's "complete preemption" analysis.[4] *See, e.g.*, App. 16a ("Although some Plaintiffs were also ESOP Participants . . . , their claims were brought solely in their capacity as former shareholders and current creditors"). The Ninth Circuit gave no independent reason for its "no displacement" holding. *See* App. 12a–17a. If the court's "dual capacity" analysis is incorrect (and it is; *see* Part B, *infra*), the "displacement" analysis falls with it.

Accordingly, if this Court agrees that the Ninth Circuit's holding on "conflict preemption" conflicts with the law in other

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3. The Ninth Circuit also stated that it could not recharacterize the ESOP Participants' claims under *subdivision (2)* of Section 502(a) because the claims sought relief on behalf of the ESOP Participants individually, not the plan. App. 19a. Even were that analysis correct (*but see* Pet. 15 n.5), that defect would not prevent the court from recharacterizing the claims under *subdivision (3)*. *See Varity Corp. v. Howe*, 516 U.S. 489, 507–15 (1996) (Section 502(a)(3) authorizes equitable relief on behalf of individual participants as well as on behalf of plan).

4. While the paraphrased passage from Section 502(a)(3) also refers to the type of relief sought, the Ninth Circuit never suggested that the ESOP Participants' claim escaped complete preemption because it sought the wrong type of relief. (Nor would such a defect allow a plaintiff to avoid complete preemption. *See* Pet. 15 n.5 and authorities cited there.)

Circuits, that conflict warrants review. There is no possibility that, should this Court review and reverse that holding, some independent obstacle to recharacterizing the ESOP Participants' claims under Section 502(a)(3) would provide an independent ground to affirm the judgment below.

B. The Ninth Circuit's "Conflict Preemption" Holding Conflicts With The Law In Five Other Circuits, And Respondents Cannot Explain Away That Conflict.

As the Petition demonstrated, the Ninth Circuit's "conflict preemption" analysis conflicts with the law in five other Circuits because it violates the basic principle, explained in *Pegram v. Herdrich*, 530 U.S. 211 (2000), that while a party may perform some acts in an ERISA fiduciary capacity and others in a non-ERISA capacity, each single act is governed either by ERISA or by state law, not both. Respondents attempt to avoid this fact in two ways: (1) by mischaracterizing the opinion below in an attempt to bring it into compliance with that principle; and (2) by trying to distinguish the conflicting opinions of other Circuits on irrelevant grounds.

1. As The Opinion Below Makes Clear, The Conduct On Which Plaintiffs Based Their Claim That The ESOP Fiduciaries Breached State Law Fiduciary Duties Consisted Largely Of ERISA-Regulated Fiduciary Acts.

In contending that the Ninth Circuit's analysis does not conflict with other Circuits' holdings, Respondents say that "the [ESOP Participants' state law] claims do not arise from the same acts *that would give rise to liability under ERISA*." Opp. 16 (emphasis added). Respondents' contention that the ESOP fiduciaries were not exposed to liability under both ERISA and state fiduciary law is odd; after all, the Respondents sued the same ESOP fiduciaries *under ERISA* for the same acts. *See* App. 6a. Respondents miss the point, which is that the Ninth Circuit has now allowed plan participants to sue ERISA fiduciaries for breach of fiduciary duties under state law with respect to *acts indisputably regulated by ERISA*.

The Ninth Circuit correctly characterized the factual predicate of Respondents' state law claims:

> The alleged conduct underlying Plaintiffs' claims was a series of breaches, misrepresentations, omissions, concealment, and conflicts of interest by Defendants . . . in conjunction with the initial leveraged buy out, *the 1987 Envirocal transaction, and subsequent ESOP activities.*" (*Id.* (emphasis added))

In "the 1987 Envirocal transaction and subsequent ESOP activities," the members of the ESOP Committee made decisions to cause the ESOP to merge with other ESOPs — transactions materially affecting the value of the ESOP's sole asset, its Norcal stock. *See* Pet. 3-4, 8-9. These decisions are paradigmatic examples of ERISA fiduciary conduct in investing and managing plan assets. *See id.* 3-4, 8-9, 15-16. In fact, the Ninth Circuit identified the *identical* conduct as subject to "duties imposed by ERISA" when it described the separate action brought by the ESOP Participants against the ESOP fiduciaries under ERISA as one "for the breach of their duties imposed by ERISA in conjunction with *the 1987 Envirocal transaction and subsequent ESOP activities*." App. 6a (emphasis added).[5]

5. The passages in the opinion on which Respondents rely *do not* establish, as Respondents imply, that the state law fiduciary breach claim was based exclusively on some other conduct not regulated by ERISA. The first passage they quote says *nothing* about what conduct was at issue and simply reiterates the court's "dual capacity" analysis:

> The claims . . . arise from [Plaintiffs'] *status* as note holders, and do not "touch on" the *status* of the ESOP as a benefit plan or of any of Plaintiffs as participants in the plan (or on any claim the participants may make against the plan *in that capacity*). (App. 14a (quoted at Opp. 17) (emphases added))

Equally unavailing is Respondents' reliance on the second quoted passage: "[t]he conduct at issue concerned the acquisition of Norcal

(Cont'd)

Thus, using its "dual capacity" analysis, the Ninth Circuit allowed the ESOP Participants to sue the ESOP fiduciaries under state fiduciary law for conduct regulated by ERISA: "the 1987 Envirocal transaction and subsequent ESOP activities." That analysis is what created the Circuit conflict.[6]

2. Respondents' Efforts To Distinguish The Other Circuits' Opinions Mischaracterize Both Those Opinions And The Petition's Argument.

Respondents try to distinguish the conflicting opinions of other Circuits by arguing that, unlike here, the conduct at issue in those cases concerned benefits or the administration of benefit plans.[7] Respondents apparently believe that such benefits claims are distinguishable for preemption purposes from claims for breach of fiduciary duty relating to an ERISA plan, as here. But a state law fiduciary breach claim relating to an ERISA plan is

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(Cont'd)
shares in exchange for restricted notes and a subsequent failure to redeem those notes." App. 16a (quoted at Opp. 17). This passage does not exhaust the opinion's catalog of the conduct at issue, as shown by the court's fuller description of "[t]he alleged conduct underlying Plaintiffs' claims" (App. 6a) quoted above.

6. Respondents' implication that this Court in *Pegram* endorsed such an analysis is mistaken. *See* Opp. 16 (accusing Petitioners of "arguing that the Court of Appeals' 'dual capacity' analysis is flawed, while conceding elsewhere that this Court has recognized the very same rule, *i.e.*, 'not all acts of a fiduciary who is for some purposes an ERISA fiduciary are fiduciary acts regulated by ERISA'") (quoting Pet. 13 (citing *Pegram*, 530 U.S. at 225)). The Ninth Circuit did not identify *separate* acts, some regulated by ERISA and some not, as *Pegram* recognized. Rather, it allowed the *same ERISA fiduciary acts* to be subject both to ERISA and to state fiduciary law.

7. *See, e.g.*, Opp. 17 (quoting App. 17a); *id.* 20 (discussing *Smith v. Provident Bank, Inc.*, 170 F.3d 609 (6th Cir. 1999)); *id.* 22–23 (discussing Second, Seventh and Eighth Circuit opinions).

no less preempted than a benefits claim; benefit claims are just more common.[8]

Respondents also incorrectly contend that Petitioners espouse, as the proper rule of law, what is actually the Petition's description of the complete preemption rule in the Sixth Circuit: "'[W]hen ERISA regulates a plan, it occupies the field of duties of care regarding the plan — fiduciary or other — and leaves no room for state law duties between the parties thereto'" Opp. 20 (quoting Pet. 20)). Respondents contend that this rule conflicts with *Pegram* and would "make ERISA the source of law for all possible claims between ESOP participants and their employer." *Id.*

But the quoted passage from the Petition simply described the Sixth Circuit's holding in *Smith v. Provident Bank*, not Petitioners' position. The Petition argues that ERISA is the source of law for claims between participants and ERISA fiduciaries (including employers) *only if* the claims concern *acts* regulated by ERISA. *See* Pet. 13–14.

Significantly, if Respondents are correct that *Smith expands* the scope of ERISA complete preemption beyond that dictated by this Court's precedents, then it all the more conflicts with the Ninth Circuit's holding in this case, which impermissibly *contracts* that scope. Respondents' argument thus only further demonstrates the extent of the circuit split.

C. Respondents Concede That The Issue Presented Is Of Nationwide Importance, Warranting This Court's Review.

Respondents have no answer to — and thus concede — Petitioners' demonstration of the broad scope and serious consequences of the Ninth Circuit's opinion: thousands of

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8. Phrased differently, if a state law claim for breach of fiduciary duty can be recharacterized as one for breach of ERISA fiduciary duty under Sections 502(a)(2) or (3), then it is no less subject to complete preemption than a state law claim that can be recharacterized as one for benefits under Section 502(a)(1).

ERISA fiduciaries face a severe dilemma if their acts in managing plan assets are subject to fiduciary duties under both ERISA and state law. Pet. 2–5, 25–26. The Ninth Circuit here allowed the ESOP Participants to proceed with claims premised on a state law fiduciary duty requiring the ESOP fiduciaries to *reject*, as harmful to the ESOP note holders, transactions that they believed their fiduciary duties under ERISA required them to *accept*, as in the interests of (all) ESOP participants. *Id.* 4. In no other Circuit (save the Fifth) could groups with divergent interests *vis-à-vis* an ERISA plan put the plan's fiduciaries in such an untenable position. The effect of this circuit split on the fiduciaries who manage the nation's more than 700,000 private pension plans justifies review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be granted.

Respectfully,

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Nos. 01-1179 and 01-1187

In the Supreme Court of the United States

BANK OF AMERICA, N.A., ETC., PETITIONERS

v.

JULIO ABRAHAM, ET AL.

NORCAL WASTE SYSTEMS, INC., ET AL., PETITIONERS

v.

JULIO ABRAHAM, ET AL.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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86 pp

QUESTION PRESENTED

Under *Metropolitan Life Insurance Co.* v. *Taylor*, 481 U.S. 58 (1987), certain state-law claims can be removed to federal court if the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, "completely preempts" them. The question presented is whether ERISA completely preempts state-law claims for breach of fiduciary duty where (a) the plaintiffs are former shareholders of a company who became participants in the company's employee stock ownership plan (ESOP), (b) the defendants include persons responsible for administering the ESOP, and (c) the alleged state-law claims arise from the plaintiffs' receipt of notes when they sold their shares to the ESOP in a leveraged buyout and do not arise from any action taken by the ESOP with respect to plaintiffs as ESOP participants.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	6
A. Respondents' claims cannot support removal jurisdiction under the complete preemption doctrine	7
B. The Section 514(a) preemption issue does not furnish an independent basis for review	10
C. The court of appeals' discussion of the prohibited transaction exemption has no bearing on the removal or preemption issue	15
D. There is no conflict in the circuits	17
Conclusion	20

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Cases:

Abraham v. *Norcal Waste Sys., Inc.*, No. 94-2730 (N.D. Cal. July 29, 1994)	4
Bartholet v. *Reishauer A.G. (Zürich)*, 953 F.2d 1073 (7th Cir. 1992)	19
Caterpillar Inc. v. *Williams*, 482 U.S. 386 (1987)	10-11
Darcangelo v. *Verizon Communications, Inc.*, 292 F.3d 181 (4th Cir. 2002)	12
Diduck v. *Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270 (2d Cir. 1992)	19
Donovan v. *Bierwirth*, 680 F.2d 263 (2d Cir.), cert. denied, 459 U.S. 1069 (1982)	13
Dudley Supermarket, Inc. v. *Transamerica Life Ins. & Annuity Co.*, 302 F.3d 1 (1st Cir. 2002)	8
Egelhoff v. *Egelhoff*, 532 U.S. 141 (2001)	14
Firestone Tire & Rubber Co. v. *Bruch*, 489 U.S. 101 (1989)	17
Franchise Tax Bd. v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983)	7, 8, 9, 17

Cases—Continued: Page

Glaziers & Glassworkers Union Local No. 252 Annuity Fund v. *Newbridge Sec., Inc.*, 93 F.3d 1171 (3d Cir. 1996) 20
Hull v. *Fallon*, 188 F.3d 939 (8th Cir. 1999), cert. denied, 528 U.S. 1189 (2000) 19
Jass v. *Prudential Health Care Plan, Inc.*, 88 F.3d 1482 (7th Cir. 1996) 19
John Hancock Mut. Life Ins. Co. v. *Harris Trust & Sav. Bank*, 510 U.S. 86 (1993) 13
Joyce v. *RJR Nabisco Holdings Corp.*, 126 F.3d 166 (3d Cir. 1997) 8
Kramer v. *Smith Barney*, 80 F.3d 1080 (5th Cir. 1996) 8, 18
Lazorko v. *Pennsylvania Hosp.*, 237 F.3d 242 (3d Cir. 2000), cert. denied, 533 U.S. 930 (2001) 12
Lehmann v. *Brown*, 230 F.3d 916 (7th Cir. 2000) 8
LoPresti v. *Terwilliger*, 126 F.3d 34 (2d Cir. 1997) 19
Lupo v. *Human Affairs Int'l, Inc.*, 28 F.3d 269 (2d Cir. 1994) 12
Martin v. *Feilen*, 965 F.2d 660 (8th Cir. 1992), cert. denied, 506 U.S. 1054 (1993) 19
Metropolitan Life Ins. Co. v. *Taylor*, 481 U.S. 58 (1987) 5, 7
Moench v. *Robertson*, 62 F.3d 553 (3d Cir. 1995), cert. denied, 516 U.S. 1115 (1996) 15
Pegram v. *Herdrich*, 530 U.S. 211 (2000) 10, 12
Pohl v. *National Benefits Consultants, Inc.*, 956 F.2d 126 (7th Cir. 1992) 12
Rice v. *Panchal*, 65 F.3d 637 (7th Cir. 1995) 12
Rivet v. *Regions Bank*, 522 U.S. 470 (1998) 8
Romney v. *Lin*, 105 F.3d 806 (2d Cir.), cert. denied, 522 U.S. 906 (1997) 8
Rush Prudential HMO, Inc. v. *Moran*, 122 S. Ct. 2151 (2002) 17
Smith v. *Dunhan-Bush, Inc.*, 959 F.2d 6 (2d Cir. 1992) 18, 19

Cases—Continued: Page

Smith v. *Provident Bank*, 170 F.3d 609 (6th Cir. 1999) 8, 17, 18

Sommers Drug Stores Co. Employee Profit Sharing Trust v. *Corrigan Enters., Inc.*, 793 F.2d 1456 (5th Cir. 1986), cert. denied, 479 U.S. 1034 (1987) 13, 18

Varity Corp. v. *Howe*, 516 U.S. 489 (1996) 12

Statutes and regulations:

Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.* 1

§ 3(14), 29 U.S.C. 1002(14) 3

§ 3(21)(A), 29 U.S.C. 1002(21)(A) 11

§ 404(a)(1)(A), 29 U.S.C. 1104(a)(1)(A) 4, 10

§ 404(a)(1)(B), 29 U.S.C. 1104(a)(1)(B) 4

§ 406(a), 29 U.S.C. 1106(a) 3

§ 408(b)(3), 29 U.S.C. 1108(b)(3) 3

§ 408(c)(3), 29 U.S.C. 1108(c)(3) 11

§ 502(a), 29 U.S.C. 1132(a) ..... *passim*

§ 502(a)(1)(B), 29 U.S.C. 1132(a)(1)(B) 8

§ 502(a)(2), 29 U.S.C. 1132(a)(2) 9

§ 502(a)(3), 29 U.S.C. 1132(a)(3) 9

§ 514(a), 29 U.S.C. 1144(a) 5, 6, 7, 10, 13, 14, 15, 16, 20

§ 514(b)(2)(A), 29 U.S.C. 1144(b)(2)(A) 13

Labor-Management Relations Act, 1947, § 301, 29 U.S.C. 185 11

5 U.S.C. 1367(a) 5

28 U.S.C. 1367(a) 5

28 U.S.C. 1441(b) 7

26 C.F.R. 54.4975-7(b) 3

29 C.F.R.:

Section 2509.94-2 14

Section 2550.408b-3 3

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ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

Respondents are a group of former stockholders of a predecessor firm of petitioner Norcal. In a 1986 buyout, an ESOP (an Employee Stock Ownership Plan) bought the stock from respondents in return for cash and notes. Forty-four of the 147 respondents continued as employees of the reorganized firm and thus became participants in the ESOP, which is subject to the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.* Norcal eventually defaulted on its debt to respondents. Respondents filed a state-court action against, *inter alia*, the ESOP

and members of its administrative committee, alleging violation of state-law duties owed to respondents as former stockholders and current noteholders of Norcal. The action was removed to federal court. The court of appeals held that there was no federal removal jurisdiction under the "complete preemption" doctrine, because respondents were suing as former shareholders and current noteholders, not as participants in the ERISA plan, and their claims therefore could not have been brought under ERISA's civil enforcement provisions. Although the court of appeals also concluded that petitioners have no preemption defense on the merits to respondents' state-law claims, the court's holding that the federal court had no removal jurisdiction was sufficient to dispose of this case.

1. In 1986, petitioner Norcal Solid Waste Systems, Inc. (Norcal), created an ESOP as part of the company's leveraged buyout of its employee-shareholders. Pet. App. 3a. Under the buyout, a group of banks, led by petitioner Bank of America, made loans to Norcal, which loaned the money to the newly-created ESOP. *Ibid.* The ESOP then bought the shares of the employee-shareholders for $65 million in cash and $36.5 million in long-term notes. *Ibid.* Respondents are 147 former employee-shareholders (or their representatives) who received those notes in the exchange. See 01-1179 Pet. 7.

The notes were governed by a trust indenture agreement between the ESOP, as obligor, and one of the bank lenders, Security Pacific National Bank, as the trustee. Pet. App. 3a. The indenture was governed by California law. *Id.* at 4a. Under the indenture, the banks could not take action against the ESOP's assets to recover the debt. The indenture also prohibited the ESOP from merging into another entity unless the ESOP first redeemed the outstanding principal on the notes, and it required the indenture trustee to exercise its rights and powers if there was a default. The notes were permitted by regulations that create an exception to

ERISA's prohibition against transactions between an ERISA plan and a "party in interest."[1]

2. In December 1987, Norcal combined with Envirocal, Inc., and the Norcal ESOP combined with Envirocal's ESOP. Pet. App. 5a. In May 1988, Security Pacific, as indenture trustee, told respondent noteholders that no action had been taken that materially affected them. *Ibid.* In September 1988, the ESOP told its participants—44 of whom were among the 147 respondent noteholders—of the transaction. In 1990, the Norcal ESOP merged with another company's ESOP. Norcal and the Norcal ESOP took on additional debt in those transactions. 01-1187 Pet. 9. In April 1991, Norcal defaulted on its debts, and the Norcal ESOP defaulted on its indebtedness to the noteholders. Pet. App. 5a.

3. In 1994, all 147 respondent noteholders filed a state-court action against Norcal, the Norcal ESOP, Norcal's bank lenders, and several individual officers and directors of Norcal. Pet. App. 5a-6a.[2] Bank of America, which had by then merged with Security Pacific, was sued both for its conduct as a lender and for Security Pacific's conduct as trustee under the indenture. *Ibid.*

The complaint sought relief under state law for alleged wrongdoing in connection with the 1986 leveraged buyout, the 1987 Envirocal transaction, and subsequent ESOP activi-

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[1] ERISA generally prohibits transactions between a plan and a "party in interest," a term that includes employers who sponsor a plan and employees who participate in it. 29 U.S.C. 1002(14) (definition of "party in interest"), 1106(a) (prohibition). A non-recourse loan to an ESOP that meets certain conditions is exempt from that prohibition. See 29 U.S.C. 1108(b)(3); 29 C.F.R. 2550.408b-3; 26 C.F.R. 54.4975-7(b).

[2] The court of appeals stated that the officer and director defendants included members of the ESOP's Administrative Committee, without further elaboration. Pet. App. 5a-6a. In fact, two of those defendants were alleged to be directors of Norcal and members of the ESOP committee, but three other "officer and director" defendants were sued only as members of the ESOP committee. See Compl. ¶¶ 16, 19, 22, 23, 24.

ties. Pet. App. 6a. "The acts allegedly resulted in [respondents'] unwitting reliance in tendering their shares in Norcal for restricted notes, the [indenture trustee's] failure to redeem or enforce redemption of those notes at the time of the Envirocal transaction, and the eventual default on [the] notes." *Ibid.* Count 5 of the complaint alleged that the officer and director defendants owed a state-law fiduciary duty to respondents as shareholders that continued after they exchanged their shares for the notes. Compl. ¶ 98. They breached that duty, the complaint alleged, by arranging for Norcal and the ESOP to enter into mergers in violation of the indenture and shouldering massive new debts that were made superior to respondents' notes. *Id.* ¶ 101. As relief, respondents sought general and punitive damages. *Id.* ¶ 103. Counts 4 and 6 made similar allegations against the officer and director defendants and others under constructive fraud and negligence theories. *Id.* ¶¶ 86-95, 104-109.

Forty-four of the 147 noteholders—those who were ESOP participants as well—simultaneously filed a federal court action under ERISA's civil enforcement provision, Section 502(a), 29 U.S.C. 1132(a), alleging that Norcal, the Norcal ESOP, and the individual officer and director defendants who also had been sued in state court had breached their fiduciary duties to the ESOP participants. Pet. App. 6a; Compl. ¶¶ 9-19, *Abraham* v. *Norcal Waste Sys., Inc.*, No. 94-2730 (N.D. Cal. July 29, 1994). Those alleged breaches occurred when the defendants caused Norcal and its ESOP to merge with other companies and their ESOPs in 1987 and 1990 without an adequate investigation and independent advice regarding the participants' interests. *Id.* ¶¶ 15-18. The ESOP participants alleged that those actions violated Sections 404(a)(1)(A) and (B) of ERISA, 29 U.S.C. 1104(a)(1)(A) and (B), which require a fiduciary to act solely in the interest of plan participants, for the exclusive purpose of providing

them benefits, and with a high degree of prudence. Compl. ¶ 19.

4. Norcal, the ESOP, and the individual defendants removed the state-court action to federal court, based on the "complete preemption" doctrine of *Metropolitan Life Insurance Co.* v. *Taylor*, 481 U.S. 58 (1987). Pet. App. 6a. Under that doctrine, a claim pleaded under state law that in fact falls within the scope of ERISA's civil enforcement section, 29 U.S.C. 1132(a), is removable to federal court.

The district court concluded that removal was proper. Pet. App. 21a-22a. The court then asserted supplemental jurisdiction over the remaining claims and parties pursuant to 28 U.S.C. 1367(a). Pet. App. 6a-7a. In 1995, the parties settled all claims except for the respondent noteholders' claims against Bank of America, as successor to the trustee under the indenture. *Id.* at 7a. In 1996, Norcal and the ESOP intervened to obtain a declaration that they had no obligation under the indenture to indemnify the Bank. *Ibid.* Bank of America prevailed, after a jury trial, against the noteholders, and Norcal and the ESOP prevailed on the indemnification issue. The noteholders appealed on the ground that the judgment against them should be vacated because the district court lacked removal jurisdiction, *id.* at 7a-8a, and Bank of America appealed on the indemnification issue.

5. The court of appeals vacated the district court's judgments. Pet. App. 8a-20a. The court reasoned that the district court lacked subject matter jurisdiction over the respondent noteholders' state-court complaint because it did not present a federal question on its face or under the "complete preemption" doctrine. *Id.* at 9a. The court stated that complete preemption may be invoked only if ERISA expressly preempts the state cause of action under Section 514(a), 29 U.S.C. 1144(a), *and* the cause of action is encompassed within ERISA's civil enforcement provision, Section 502(a), 29 U.S.C. 1132(a). Pet. App. 9a. In the court's view,

Section 514(a) does not preempt the state cause of action and the action is outside the scope of Section 502(a). *Ibid.* Accordingly, the court held that removal of the state-court action was improper and ordered it remanded to state court. *Id.* at 8a, 20a.

DISCUSSION

Under ERISA, the "complete preemption" doctrine permits removal of claims that are pleaded on their face as state-law claims but that in fact fall within the exclusive federal cause of action provided by Section 502(a) of ERISA. Respondents' claims do not do so. Forty-four of the 147 respondents were participants in the ESOP, which is an ERISA plan. They brought their state-law claims, however, not in their status as ERISA plan participants, but rather to assert rights that they, like the other 103 respondents, allegedly acquired under state law as former stockholders and current noteholders. Respondents therefore do not assert claims that fall within the scope of ERISA Section 502(a), and their claims accordingly were not properly removed to federal court.

Although the court of appeals' holding that the district court did not have jurisdiction was dispositive, the court also addressed the question whether respondents' state-law claims are preempted under ERISA's express preemption provision in Section 514(a)—*i.e.*, whether petitioners have a valid federal preemption *defense* to respondents' state-law claims *on the merits*. The court held that respondents' state-law claims do not "relate to" an ERISA plan, and are therefore not preempted under Section 514(a). Petitioners contend that that ruling is incorrect.

Insofar as petitioners suggest that an ERISA fiduciary may never be held liable under state law, their argument is too broad. ERISA fiduciaries remain subject to state law insofar as they serve in other roles at the same time, and the ERISA plans they administer remain subject to state laws of

general applicability in other contexts as well. Ultimately, however, the disposition of this case does not turn on whether respondents' state-law claims are subject to "ordinary" preemption under Section 514(a). A federal preemption *defense* on the merits under Section 514(a)—as opposed to "complete preemption" under Section 502(a)—cannot provide the basis for federal jurisdiction. Accordingly, regardless of whether the state law on which respondents rely for their claims on the merits is preempted under Section 514(a) of ERISA, the court of appeals correctly concluded that there is no "complete preemption" of—and thus no federal jurisdiction over—respondents' state-law causes of action. That jurisdictional ruling is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

A. Respondents' Claims Cannot Support Removal Jurisdiction Under The Complete Preemption Doctrine

1. Under 28 U.S.C. 1441(b), a civil action brought in state court that is founded on a claim or right arising under federal law may be removed to federal court. Because preemption is ordinarily a federal defense to the plaintiff's suit, "it does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court." *Metropolitan Life*, 481 U.S. at 63. Thus, preemption under Section 514(a) of ERISA, does not, standing alone, authorize removal of a state-court action to federal court. *Id.* at 64; *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983).

A corollary to the well-pleaded complaint rule "is that Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." *Metropolitan Life*, 481 U.S. at 63-64. In *Metropolitan Life*, the Court held that a state-law claim alleging improper processing of a claim for

benefits under an ERISA plan is subject to "complete preemption," because it falls within the scope of the "exclusive federal cause of action for resolution of such disputes" created by Section 502(a)(1)(B) of ERISA, 29 U.S.C. 1132(a)(1)(B). Courts of appeals have concluded, and respondents do not dispute, that "complete preemption" also applies to claims that fall within other subsections of Section 502(a).[3]

Removal is permissible under the complete preemption doctrine only when a federal cause of action occupies a field so completely that every claim in that field necessarily arises under federal law, and any attempt to present a state-law claim is "artful pleading" to get around the federal nature of the claim. See *Rivet* v. *Regions Bank*, 522 U.S. 470, 475 (1998); *Lehmann* v. *Brown*, 230 F.3d 916, 919 (7th Cir. 2000). A court faced with such artful pleading will recharacterize the state-law claim to include the necessary federal claim, because a state-law claim within the completely preempted area "is considered, from its inception, a federal claim, and therefore arises under federal law." *Rivet*, 522 U.S. at 476. Conversely, however, a state-law claim outside the completely preempted area does not arise under federal law and is not removable even if there is a valid federal preemption defense to the claim. *Franchise Tax*, 463 U.S. at 25-27.

2. The state-law claims at issue here are not subject to removal under the complete preemption doctrine, because they fall outside the scope of Section 502(a) of ERISA. All 147 respondents—including the 44 who were also partici-

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[3] See, *e.g.*, *Dudley Supermarket, Inc.* v. *Transamerica Life Ins. & Annuity Co.*, 302 F.3d 1, 3-4 (1st Cir. 2002) (breach of fiduciary duty); *Smith* v. *Provident Bank*, 170 F.3d 609, 613 (6th Cir. 1999) (same); *Joyce* v. *RJR Nabisco Holdings Corp.*, 126 F.3d 166, 171-172 (3d Cir. 1997) (same); *Romney* v. *Lin*, 105 F.3d 806, 810 (2d Cir.) (suit by fiduciary to collect unpaid contributions), cert. denied, 522 U.S. 906 (1997); *Kramer* v. *Smith Barney*, 80 F.3d 1080, 1083-1084 (5th Cir. 1996) (breach of fiduciary duty).

pants in the ESOP—brought those claims in their capacities as former shareholders of Norcal and current noteholders, and they alleged that petitioners violated duties owed to former shareholders and current noteholders under state law. Compl. ¶ 98. Section 502(a) does not provide for suits by shareholders or noteholders. Section 502(a)(2) authorizes an action "by the Secretary, or by a participant, beneficiary or fiduciary" of an ERISA plan, to obtain appropriate relief against a fiduciary who violates ERISA, and Section 502(a)(3) authorizes "a participant, beneficiary, or fiduciary" to obtain appropriate equitable relief to redress ERISA violations. 29 U.S.C. 1132(a)(2) and (3). Because respondents are not asserting rights they enjoy as participants in or beneficiaries of an ERISA plan, their claims do not arise under Sections 502(a)(2) or (3). Cf. *Franchise Tax*, 463 U.S. at 26-27 (State-court action by a State against an ERISA plan is not subject to removal because Section 502 "does not provide anyone other than participants, beneficiaries, or fiduciaries with an express cause of action * * *. A suit for similar relief by some other party does not 'arise under' that provision.").

Indeed, the proposition that respondents are asserting a claim that does not arise under ERISA follows from the fact that, had the case been brought solely by the 103 respondents who do not also happen to be participants in the ESOP, it clearly would not be completely preempted and could not have been removed. Norcal acknowledges that conclusion (see 01-1187 Reply Br. 4 n.2), and Bank of America does not dispute it. But the claims brought in the state-court action by the 44 respondents who *are* plan participants are precisely the same claims brought by the 103 who are not. Accordingly, if the state-law claims brought by the non-plan-participants do not arise under ERISA, neither do the same claims brought by the plan participants.

B. The Section 514(a) Preemption Issue Does Not Furnish An Independent Basis For Review

Petitioners argue that the state-court action brought by the 44 respondents who are plan participants was subject to removal because those respondents challenge, *inter alia*, the same act—a decision by members of the ESOP administrative committee to approve certain mergers—that formed the basis for an ERISA breach-of-fiduciary-duty action brought in federal court by that same group of 44 respondents. 01-1187 Pet. 13-14; 01-1179 Reply Br. 1, 8. Petitioners contend that if an act is subject to ERISA fiduciary duties, it cannot also be subject to state-law duties because ERISA requires a fiduciary to act solely in the interest of plan participants and beneficiaries, 29 U.S.C. 1104(a)(1)(A), and an individual who serves in a dual capacity must "wear only one [hat] at a time, and wear the fiduciary hat when making fiduciary decisions." *Pegram* v. *Herdrich*, 530 U.S. 211, 225 (2000). See 01-1187 Pet. 13-14; 01-1179 Reply Br. 6-7 n.3. Petitioners conclude that if an act is subject to ERISA and not to state law, a state-law claim challenging that act by a person who is a plan participant is necessarily a claim by a participant against an ERISA fiduciary within the scope of Section 502(a). See 01-1187 Pet. 14.

1. Assuming the correctness of petitioners' premise that a given act could never be subject to both ERISA and state law, petitioners' conclusion would nevertheless be incorrect. If a given act is governed solely by ERISA, state-law duties surrounding the performance of that act are necessarily preempted under Section 514(a) of ERISA. Nonetheless, a state-law claim challenging that act brought by a person who happens to be a plan participant is not a claim by a participant against an ERISA fiduciary within the scope of Section 502(a) when the claim is based on duties under state law that are independent of the individual's status as a participant. That conclusion follows from *Caterpillar Inc.* v. *Williams*,

482 U.S. 386 (1987), where employees challenged a defendant's act (termination of employment) solely on state-law grounds (breach of individual employment contracts), even though the employees had federal rights under a subsequent collective bargaining agreement that, if asserted, would have led to complete preemption under Section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. 185. See 482 U.S. at 390, 394-395. The Court held that the state-law claims were not completely preempted because "individual employment contracts are not inevitably superseded by any subsequent collective agreement covering an individual employee." *Id.* at 396.

That reasoning applies in this case. The respondents in this case who are participants in the ESOP, like the employees in *Caterpillar*, are relying on state-law rights (here, as former shareholders and current noteholders) the origins of which predated and which remain independent of the rights they later acquired as ESOP participants. Those state-law rights are not inevitably superseded by the participants' rights under the ESOP. Thus, as in *Caterpillar*, the state-law claims are not completely preempted, and petitioners, like the employer in *Caterpillar*, 482 U.S. at 397-398, had to raise their preemption defense on the merits in state court.

2. Moreover, petitioners' underlying premise—that a given act cannot ever be subject to both state law and ERISA—is incorrect. As petitioners recognize, an individual may serve in "dual capacities," both as a fiduciary of an ERISA plan and in some non-ERISA capacity, such as employer, director of a corporation, or medical care provider. See 29 U.S.C. 1002(21)(A) (person is an ERISA fiduciary "to the extent" that he or she performs certain plan-related functions); see also 29 U.S.C. 1108(c)(3) (employer may act as ERISA fiduciary while also serving as "officer, employee, agent, or other representative of a party in interest" to an

ERISA plan); *Pegram*, 530 U.S. at 223 (HMO may serve as fiduciary and as a provider of medical services); *Varity Corp.* v. *Howe*, 516 U.S. 489, 498 (1996). As a general rule, state-law claims against an individual serving in such "dual capacities" are outside the scope of Section 502(a) of ERISA insofar as they challenge acts taken in the non-ERISA-fiduciary capacity.[4]

To be sure, an ERISA fiduciary ordinarily is required to act solely in the interests of plan participants to the extent the fiduciary is making decisions that are subject to ERISA's requirements. ERISA fiduciaries, however, engage in a variety of activities (*e.g.*, investing in securities, leasing property, lending money) that are subject to state and federal laws generally applicable to those who perform such activities, and they are not free to ignore those laws just because they are ERISA fiduciaries. For example, the trustees of an ERISA plan that owns a commercial building as part of its investment portfolio would be required to comply with building and safety codes and other state laws applicable to such buildings, even if to do so would require the expenditure of funds that in their view would be better preserved for plan beneficiaries. In that situation, the trustees may not ignore state laws of general applicability in order to pursue single-mindedly the interests of plan beneficiaries. In other circumstances, state laws, such as those regulating "securities," may be expressly applicable under

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[4] *Darcangelo* v. *Verizon Communications, Inc.*, 292 F.3d 181, 191-194 (4th Cir. 2002) (participant's claims that plan administrator improperly released confidential medical information not within Section 502(a) of ERISA); *Lazorko* v. *Pennsylvania Hosp.*, 237 F.3d 242, 249 (3d Cir. 2000) (same for participant claims against HMO in its capacity as medical care provider), cert. denied, 533 U.S. 930 (2001); *Rice* v. *Panchal*, 65 F.3d 637, 642-646 (7th Cir. 1995) (same); *Lupo* v. *Human Affairs Int'l, Inc.*, 28 F.3d 269, 271-272 (2d Cir. 1994) (same); *Pohl* v. *National Benefits Consultants, Inc.*, 956 F.2d 126, 128 (7th Cir. 1992) (dicta) (removal not appropriate if participant sued plan for slip-and-fall injury at plan's offices).

the saving clause in Section 514(b)(2)(A) of ERISA, 29 U.S.C. 1144(b)(2)(A).

In addition, a fiduciary may act in a way that violates both ERISA and state law. For example, a corporate officer who is also a trustee of an ERISA plan may take actions that violate duties owed to a pension plan or its beneficiaries under ERISA and also violate duties owed by the corporation or its directors to minority shareholders, including the plan, under state law. See *Sommers Drug Stores Co. Employee Profit Sharing Trust* v. *Corrigan Enters., Inc.*, 793 F.2d 1456, 1458, 1468-1469 (5th Cir. 1986), cert. denied, 479 U.S. 1034 (1987). Such an individual may reasonably be held liable for breach of both ERISA and state-law duties in at least some circumstances, because he typically would have voluntarily assumed such dual obligations, may generally be able to act consistently with both sets of duties (cf. *John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank*, 510 U.S. 86, 100 (1993)), and can generally take steps—such as resigning from the ERISA role—to avoid conflicts. See 793 F.2d at 1469; *Donovan* v. *Bierwirth*, 680 F.2d 263, 271-272 (2d Cir.), cert. denied, 459 U.S. 1069 (1982). The alternative advocated by petitioners would allow individuals who have state-law duties to assume inconsistent ERISA responsibilities and then argue that their new ERISA responsibilities eliminate their state-law duties.

3. In this particular case, difficult questions are raised by petitioners' claim that Section 514(a) of ERISA preempts respondents' claim against the "officer and director" defendants who were sued in their capacities as members of the ESOP administrative committee. The state-court complaint may be read to allege that the committee members had a state-law duty to act (at least in part) in the interest of all 147 respondent noteholders when deciding whether to approve the Envirocal merger. See Compl. ¶¶ 22, 23, 24, 98, 101. A state law requiring an ERISA fiduciary, based on the

interests of the noteholders, to vote for or against a merger of a corporation in which the plan owns stock would appear to conflict with the specific requirement in Department of Labor regulations that a fiduciary, in voting an ESOP's shares, "consider those factors that may affect the value of the plan's investment and not subordinate the interests of the participants and beneficiaries in their retirement income to unrelated objectives." 29 C.F.R. 2509.94-2 (proxy voting). Assuming that there is no state-law duty of general applicability that properly attaches to the shares and voting rights held by the ESOP in those circumstances, such a conflict could lead to preemption of state-law claims against the fiduciaries. See, *e.g.*, *Egelhoff* v. *Egelhoff*, 532 U.S. 141, 150 (2001). On the other hand, there may be more room for the operation of state law if the complaint is read to allege that specific officer and director defendants breached a pre-existing state-law duty by putting themselves in a position (as ERISA fiduciaries) where they could have to act in conflict with their state-law duties.

4. Whether the court of appeals erred in finding no preemption under Section 514(a), however, does not affect the ultimate disposition of this case. The court's judgment rests on an ultimate conclusion that respondents' state-law claims were improperly removed to federal court—a conclusion that does not depend on the correctness of the court of appeals' preemption analysis under Section 514(a). Furthermore, the court's analysis under Section 514(a) may have limited precedential value, because the court did not discuss the portions of the complaint on which petitioners rely in this Court in arguing for preemption. In particular, the court did not address the significance of respondents' apparent allegations (see note 2, *supra*) that three individuals were sued solely for actions taken in their capacities as ERISA fiduciaries. See Pet. App. 5a-6a (noting only that state-court action was commenced against "several individual officers

and directors of the defendant corporations (*including some members of the ESOP Administrative Committee*)") (emphasis added). Moreover, the court's finding of no preemption under Section 514(a) should have little effect even on the parties in this case. All of the parties, except petitioner Bank of America, have settled their claims with respondents. *Id.* at 7a. Assuming that those settlements remain binding, the only issues that remain open concern respondents' state-law claims against Bank of America as successor to the trustee under the indenture agreement, and whether Norcal and the Norcal ESOP have indemnity obligations to Bank of America on those claims. *Ibid.* Those claims are not subject even to ordinary preemption under Section 514(a) of ERISA. Review of the question whether Section 514(a) would preempt other claims, which have already been settled, is unwarranted.

C. The Court Of Appeals' Discussion Of The Prohibited Transaction Exemption Has No Bearing On The Removal Or Preemption Issues

Bank of America contends (01-1179 Pet. 13) that "[t]he Ninth Circuit's decision is grounded on the fact that the challenged transactions are exempt from certain restrictions that generally apply to ERISA plans and fiduciaries"—the "prohibited transaction" rules that preclude certain transactions between a plan and a "party in interest." See note 1, *supra*. Bank of America asserts (Pet. 13) that the court of appeals "concluded that, because the transactions at issue were 'expressly exempted from the prohibited transaction provision,' they were not regulated by ERISA and thus were subject to regulation under state law"—a conclusion that Bank of America asserts conflicts with *Moench* v. *Robertson*, 62 F.3d 553, 567-573 (3d Cir. 1995), cert. denied, 516 U.S. 1115 (1996), and other decisions.

Even if all of the above contentions were correct, they would concern only the Ninth Circuit's holding on ordinary

preemption under Section 514(a) of ERISA—not the dispositive jurisdictional holding that removal was improper because this case is not subject to complete preemption. In any event, Bank of America's contentions are not correct. The court of appeals did not ground its decision that ERISA does not preempt the participant-noteholders' state-law claims on the fact that transactions between an ESOP and parties in interest are subject to exemption from ERISA's rules prohibiting transactions involving parties in interest. Nor did the court find that the exemption from ERISA's prohibited transaction rules for some transactions means that those transactions are not subject to ERISA at all. Rather, the court simply concluded that the participant-noteholders' claims based on asserted state-law duties owed to former shareholders and current creditors "did not implicate the prohibited transaction provision" of ERISA, and that, as a result, their "status as 'parties in interest [under ERISA] is irrelevant'" to their state-law claims. Pet. App. 12a. Indeed, petitioners themselves rely on the participant-noteholders' status as plan *participants*—not their status as parties in interest—to support their preemption arguments. See, *e.g.*, 01-1179 Pet. 14 (ERISA governs transactions that fall within the prohibited transaction rules because ERISA fiduciaries must "act solely in the interest of *plan participants and beneficiaries*") (emphasis added).

As the court of appeals observed, by crafting exceptions to the prohibited transaction rules, Congress presumably intended that, "in all respects *unrelated to the objectives and administration of ERISA*," state law would govern the transactions that the exceptions allow. Pet. App. 13a. That conclusion is consistent with Bank of America's contention that in other respects that *are* related to the objectives and administration of ERISA, "ERISA *does* govern transactions that fall within the exemptions to ERISA's prohibited transaction provisions for ESOPS." 01-1179 Pet. 13.

D. There Is No Conflict In The Circuits

Petitioners assert that the court of appeals' decision conflicts with decisions of five other courts of appeals. 01-1179 Pet. 13-19; 01-1187 Pet. 19-24.[5] There is no conflict, however, because each of the cases cited by petitioners involved a claim that arose from a relationship governed by ERISA. Accordingly, none of those decisions addressed the issue presented here: whether ERISA completely preempts state-law claims by ERISA participants based on alleged violations of pre-existing and independent state-law duties.[6]

1. In *Smith* v. *Provident Bank*, 170 F.3d 609 (6th Cir. 1999), an ERISA plan participant brought suit in state court alleging that a bank had breached a fiduciary duty under state law when it took stock out of the plaintiff's ERISA-plan account to correct an error it had made in another customer's account. *Id.* at 612. The court held that removal

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[5] Bank of America expected this Court's decision in *Rush Prudential HMO, Inc.* v. *Moran*, 122 S. Ct. 2151 (2002), to address removal. See 01-1179 Pet. 19. *Rush* did not address removal, except to restate the "complete preemption" rule and to suggest that a suit to compel compliance with the state HMO law could have been considered a suit to compel compliance with an ERISA plan or a suit to recover benefits under Section 502(a) of ERISA. 122 S. Ct. at 2157 & n.2, 2164-2165.

[6] Bank of America sees a conflict with this Court's recognition that ERISA is intended to create a uniform body of federal law to govern the obligations of ERISA fiduciaries. 01-1179 Pet. 18 (discussing *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989)). *Firestone* did not, however, address removal jurisdiction, or suggest that complete preemption is required whenever uniformity is threatened. Indeed, it is clear that complete preemption does *not* follow whenever uniformity is threatened by a state-law claim. As petitioners apparently acknowledge (see p. 9, *supra*), a state-law action by the 103 respondents who were not participants in the ERISA plan would not have been subject to removal. Yet such an action would raise precisely the same issues regarding the uniformity of obligations imposed on fiduciaries as does this action, brought by all 147 respondents. See *Franchise Tax Bd.*, 463 U.S. at 4 (removal improper, notwithstanding presence of "important" ERISA preemption issue that "must eventually receive a definitive, uniform resolution").

of the case to federal court was proper, reasoning that ERISA preempted the state-law breach-of-fiduciary-duty claim and that removal was proper because "[a] claim for breach of fiduciary duty against the fiduciary of an ERISA plan necessarily presents a federal question." *Id.* at 614.

In contrast to the plaintiff's claims in *Provident Bank*, respondents' asserted state-law "fiduciary duty" rights are independent of the ERISA plan because they existed regardless of whether some former shareholders and hence current noteholders later became ESOP participants. Accordingly, the Sixth Circuit's statement that "[a] claim for breach of fiduciary duty against the fiduciary of an ERISA plan necessarily presents a federal question," 170 F.3d at 614, means only that a claim for breach of an *ERISA* fiduciary duty—*i.e.*, one that grows out of a participant-fiduciary relationship under ERISA—necessarily presents a federal question. Thus, the Sixth Circuit's decision is consistent with the Ninth Circuit's decision here.[7]

2. For similar reasons, *Smith* v. *Dunham-Bush, Inc.*, 959 F.2d 6 (2d Cir. 1992), does not conflict with the decision in this case. In *Dunham-Bush*, an employee brought an action in state court to enforce an oral promise by his employer to provide pension benefits. *Id.* at 7. The Second Circuit held that ERISA preempted the claim because it was "an attempt to supplement the plan's express provisions and secure an additional benefit." *Id.* at 10. The court also held that the state-law claim could be removed to federal court because a

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[7] In holding that the state-law claim in *Provident Bank* was subject to removal, the Sixth Circuit cited the Fifth Circuit's decision in *Kramer*. See 170 F.3d at 614. *Kramer*, like *Provident Bank*, found removal jurisdiction with respect to a plan participant's claim against a fiduciary for mismanaging stock in his account. See *Kramer*, 80 F.3d at 1082. *Kramer* coexists in the Fifth Circuit with *Sommers Drug*, which held that ERISA does not preempt state-law claims that arise from a corporation's "parallel but independent" duties to its shareholders. *Sommers Drug*, 793 F.2d at 1468; see Pet. App. 14a-15a (Ninth Circuit's reliance on *Sommers Drug*).

"claim for add-on benefits necessarily falls within the intended scope of the civil enforcement provisions of section 502(a)(1)(B)." *Id.* at 11. Thus the state-law rights asserted in *Dunham-Bush*, unlike those in this case, arose directly from the employee's status as a plan participant.[8]

3. In *Hull* v. *Fallon*, 188 F.3d 939 (8th Cir. 1999), cert. denied, 528 U.S. 1189 (2000), a plan participant brought a state-court malpractice action against a doctor who was also the plan administrator, based on the doctor's failure to authorize medical treatment. *Id.* at 941. The court held that the action fell within the scope of Section 502(a) of ERISA because the defendant was acting as plan administrator rather than the participant's treating physician, and "the essence of [the] claim rests on the denial of benefits." *Id.* at 943. *Hull* thus did not address a case like this, in which the plaintiffs' claims are independent of their status as plan participants. Nor did *Hull* question the Eighth Circuit's prior recognition in *Martin* v. *Feilen*, 965 F.2d 660, 667 (1992), cert. denied, 506 U.S. 1054 (1993), that fiduciaries of an ESOP have both duties under ERISA and state-law duties as corporate stockholders.

4. The Seventh Circuit's decision in *Jass* v. *Prudential Health Care Plan, Inc.*, 88 F.3d 1482, 1489-1490 (1996), held that a state-law negligence claim was actually a denial-of-benefits claim covered by Section 502(a) of ERISA, and its decision in *Bartholet* v. *Reishauer A.G. (Zurich)*, 953 F.2d 1073, 1078 (1992), held that ERISA completely preempts an

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[8] Contrary to Bank of America's assertion (01-1179 Pet. 16), there is also no conflict with the Second Circuit's decisions in *LoPresti* v. *Terwilliger*, 126 F.3d 34 (1997), and *Diduck* v. *Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270 (1992). In those cases, the court held that Section 514(a) of ERISA preempts a state-law action for conversion, brought by an ERISA plan trustee or plan participants to recover plan losses from another fiduciary or a third party that dealt with the plan. See *LoPresti*, 126 F.3d at 41; *Diduck*, 974 F.2d at 288. Neither case involved rights that were independent of the operation of the ERISA plan.

employee's state-law claim alleging breach of a promise to establish a pension plan that gave certain pension credit to the employee. Both cases thus involved claims that, unlike respondents' claims here, arose from the basic ERISA participant-plan relationship.

5. Finally, in *Glaziers & Glassworkers Union Local No. 252 Annuity Fund* v. *Newbridge Securities, Inc.*, 93 F.3d 1171 (3d Cir. 1996), a plan fiduciary brought a federal court action against a brokerage firm alleging that a failure to disclose certain information about one of the firm's employees violated ERISA and state-law fiduciary duties. The Third Circuit concluded that ERISA did not necessarily preempt the state-law claims to the extent that the brokerage firm was not an ERISA fiduciary. *Id.* at 1185. The court had no occasion to—and did not—consider the application of the complete preemption doctrine. Nor did the Third Circuit address even the narrow preemption issue under Section 514(a) in this case: whether an ERISA fiduciary taking action that affects another person both as an ERISA participant and in an unrelated status may be subject to both federal and state law.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

NORCAL WASTE SYSTEMS, INC. and NORCAL WASTE SYSTEMS, INC. EMPLOYEE STOCK OWNERSHIP PLAN AND TRUST,

Petitioners,

v.

JULIO ABRAHAM, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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STATEMENT PURSUANT TO RULE 29.6

Petitioner Norcal Waste Systems, Inc. set forth its corporate disclosure statement at page *ii* of its Petition for a Writ of Certiorari, and it has no amendments to that statement.

TABLE OF CONTENTS

Page

Statement Pursuant To Rule 29.6 i

Table of Contents ii

Table of Cited Authorities iii

A. The Government All But Concedes That ERISA Preempts The Breach Of Fiduciary Duty Claim. 1

B. ERISA Completely Preempts The Claim As Well. 2

C. The Ninth Circuit's Complete-Preemption Analysis Conflicts With That of Other Circuits. 5

TABLE OF CITED AUTHORITIES

Cases	Page
Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985)	3, 5
Bartholet v. Reishauer A.G. (Zurich), 953 F.2d 1073 (7th Cir. 1992)	7
Bldg. Trades Council (San Diego) v. Garmon, 359 U.S. 236 (1957)	4
Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987)	3, 4
Dudley Supermarket, Inc. v. Transamerica Life Ins. & Ann. Co., 302 F.3d 1 (1st Cir. 2002)	10
Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1 (1983)	3
Gieger v. Unum Life Ins. Co. of Am., 213 F. Supp. 2d 813 (N.D. Ohio 2002)	6-7
Guardsmark, Inc. v. Blue Cross & Blue Shield, 169 F. Supp. 2d 794 (W.D. Tenn. 2001)	7
Hull v. Fallon, 188 F.3d 939 (8th Cir. 1999)	9
Kalo v. Moen Inc., 93 F. Supp. 2d 869 (N.D. Ohio 2000)	7
Little v. UNUMProvident Corp., 196 F. Supp. 2d 659 (S.D. Ohio 2002)	7

Cited Authorities

Page

Martin v. Feilen, 965 F.2d 660 (1992) 10

Met. Life Ins. Co. v. Taylor, 481 U.S. 58 (1987) ... 2

Pegram v. Herdrich, 530 U.S. 211 (2000) 10

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) .. 4

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) ... 9

Smith v. Dunham-Bush, Inc., 959 F.2d 6 (2d Cir. 1992) 6, 7, 8

Smith v. Provident Bank, 170 F.3d 609 (6th Cir. 1999) 6, 7

Statutes

Employee Retirement Income Security Act of 1974 § 502(a), 29 U.S.C. § 1132(a) 5

Labor-Management Relations Act of 1947 § 301, 29 U.S.C. § 185 3

29 C.F.R. 2509.94-2 2

Other Authorities

H. COMM. ON EDUC. & LABOR, H. REP. No. 93-533 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639 .. 5

The Government all but concedes that the Ninth Circuit's major premise—that ERISA did not preempt the ESOP participants' breach of fiduciary duty claim against the ESOP fiduciaries—is wrong. Yet the Government argues that the decision need not be reviewed because its *other* holding—that the claim was not *completely* preempted—is correct. The Government cites no relevant authority to support its assertion, and it is mistaken. Both of the Ninth Circuit's rulings are wrong, and the issues merit review by this Court.

A. The Government All But Concedes That ERISA Preempts The Breach Of Fiduciary Duty Claim.

The Government concedes, as it must, that ERISA compels a plan fiduciary to "act solely in the interests of plan participants to the extent the fiduciary is making decisions . . . subject to ERISA's requirements." U.S. 12; Pet. 6, 11. ERISA preempts any state law that would impose different standards on an ERISA fiduciary's investment decisions.[1]

Respondents' breach of fiduciary duty claim would do just that. It asserts that the fiduciaries managing the ESOP owed a state law duty to *them*, as noteholders, to disapprove the disputed mergers because they would imperil respondents' payment on the notes. However, ERISA instructs fiduciaries that their *sole* concern in making investment decisions must be whether a proposed transaction is in the best interests of a plan and its participants. Thus, as the Government all but concedes, ERISA must preempt any state law that would *prohibit* plan fiduciaries from approving an investment transaction that their ERISA fiduciary duties *require* them to approve, because they find it to be in the best interests of the plan. U.S. 13-14 (noting conflict

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1. Parts of the Government's brief attack straw men, not contentions we have ever made. The brief notes that when plan fiduciaries do things like "investing in securities, leasing property, [or] lending money," they "are not free to ignore" generally applicable laws. U.S. 12. ERISA does not tell plan fiduciaries how to maintain a plan's real estate assets or make loans, so it cannot preempt local laws that do. But ERISA *does* supply the standards that govern fiduciaries' investment decisions.

with regulation requiring fiduciaries "'not [to] subordinate the interests of the participants and beneficiaries in their retirement income to unrelated objectives'" (quoting 29 C.F.R. 2509.94-2)).

B. ERISA Completely Preempts The Claim As Well.

The ESOP participants could have sued (and *did* sue) the ESOP fiduciaries in federal court under ERISA for breaching their ERISA fiduciary duties. Pet. 9. But the participants also sued the fiduciaries in state court to challenge the same investment decisions under a state-law standard. This ERISA does not allow. Indeed, the whole point of complete preemption is to override any such attempt by a party with ERISA standing to challenge ERISA-regulated conduct in state court by suing in an alternate state-law "capacity."

Much of the Government's brief merely recapitulates the Ninth Circuit's view that plaintiffs *can* choose between suing in their ERISA or their state-law "capacities." *E.g.*, U.S. 9 (respondents "brought [their] claims in their capacities as former shareholders . . . and current note-holders"). Our Petition showed the error of that view. Pet. 12-16.

The Government also asserts a novel theory, for which it cites no relevant authority, that ERISA may preempt yet not completely preempt a plan participant's state law claim for breach of fiduciary duty against a plan fiduciary. Yet the Government also recognizes the guiding principle of complete preemption: "'Congress may so completely pre-empt a particular area, that any civil complaint raising this select group of claims is necessarily federal in character.'" U.S. 7 (quoting *Met. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63–64 (1987)). That is precisely what we have here: ERISA participants assert state-law claims challenging ERISA fiduciaries' investment decisions about plan assets. Because ERISA *exclusively* defines what a fiduciary must do and not do in managing plan assets, there is no more compelling example of a "particular area" Congress has "so completely pre-empt[ed]. . . ."

To support its theory that ERISA might preempt but not completely preempt such a claim, the Government notes that, "had the case been brought solely by the 103 [non–ESOP participants], it clearly would not be completely preempted." U.S. 9. That statement is true, but unhelpful. It merely illustrates the undisputed rule that ERISA completely preempts a claim only if the plaintiff is a party (participant, beneficiary, or fiduciary) whom Section 502(a) empowers to bring ERISA claims. *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 26–27 (1983) ("*FTB*").

The Government also contends that *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987), supports its theory (U.S. 10); it does not. *Caterpillar* concerned complete preemption under Section 301 of the Labor-Management Relations Act of 1947 ("LMRA"), which affords federal jurisdiction over any suit for violation of a collective bargaining agreement ("CBA"). Section 301 also completely preempts state-law claims; its preemptive force "is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.' Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301." *FTB*, 463 U.S. at 23. The force of that preemption is matched by its focus: the sole touchstone of Section 301 preemption is whether a state-law claim requires a court to interpret a CBA. *See Caterpillar*, 482 U.S. at 394-95; *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985).

In *Caterpillar*, plaintiff employees belonged to a bargaining unit subject to a CBA; they had previously had managerial jobs outside the CBA's scope, under individual employment contracts. 482 U.S. at 388-90. In suing Caterpillar in state court for breaching the latter, they avoided relying on the CBA. *Id.* at 394-95. But Caterpillar argued that the CBA superseded their individual contracts, so that their claims required interpretation of the CBA and were thus completely preempted by Section 301. *Id.* at 390.

The Court disagreed. It acknowledged that plaintiffs, as bargaining unit members, had "substantial rights under the [CBA] and could have brought suit under § 301"; however, "they chose not to." *Id.* at 395. The claims they did bring, for breach of individual contracts, did not "substantially depend[] upon interpretation of the [CBA]." *Id. Caterpillar* effectively holds that Section 301 *neither* preempted *nor* completely preempted the claims.[2] It thus does *not* support a theory that ERISA might preempt but not completely preempt claims by plan participants against plan fiduciaries.

In citing *Caterpillar*, the Government ignores the fact that, in passing Section 301, Congress occupied only *part* of the field of workplace relations. *See* 482 U.S. at 396 n.10. In passing ERISA, by contrast, Congress intended to "'establish pension plan regulation as exclusively a federal concern.'" *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987) (citation omitted).

In fact, within the field of pension-plan regulation, Congress *especially* intended to occupy the subfield of fiduciary duties.

2. The Court did note that the National Labor Relations Act (NLRA) might preempt plaintiffs' claims without transforming them into claims arising under federal law and subject to removal. 482 U.S. at 397–98 & n.12. Contrary to the Government's suggestion (U.S. 11), that is *not* an example of a statute preempting yet not completely preempting a claim brought by a plaintiff with standing to sue under the statute. Unlike Section 301, which did not completely preempt *or* preempt the claims in *Caterpillar*, none of the NLRA preemption doctrines there at issue can entail complete preemption and removal, for the simple reason that state-law claims preempted by the NLRA cannot be heard in *any* court, as they concern matters committed to the jurisdiction of the NLRB. *See Bldg. Trades Council (San Diego) v. Garmon*, 359 U.S. 236, 244-45 (1957). There is no such thing as complete-preemption removal from state court to the NLRB. As for Section 301, *Caterpillar* says only that the affirmative defense that the CBA superseded the individual contracts could not warrant removal, although resolving that defense would require applying federal law to interpret the CBA. 482 U.S. at 398-99. In this case, the ESOP fiduciaries did not raise a *defense* requiring application of ERISA fiduciary standards, but showed that the ESOP participants' purported state-law *claims* can actually arise only under ERISA.

A primary goal of ERISA was to replace a welter of inconsistent state trust laws, whose application to pension plans was uncertain, with a uniform set of strict federal standards. *See* H. COMM. ON EDUC. & LABOR, H. REP. No. 93-533 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, at 4641-46, 4649-51. Congress thus gave federal courts *exclusive* jurisdiction over claims for breach of ERISA fiduciary duties, as opposed to the *concurrent* jurisdiction it afforded over claims for improper denial of benefits (28 U.S.C. § 1132(a)), and had afforded in the LMRA over claims for violations of CBAs (*Lueck*, 471 U.S. at 209 n.5).

ERISA thus preempts any claim that would impose state-law duties on an ERISA fiduciary when deciding how to invest or manage plan assets. If the claim is made by a proper plaintiff, ERISA completely preempts it. Nothing in ERISA limits the scope of that complete preemption like Congress' desire, in passing Section 301, to preserve much of the States' power to regulate workplace relations.

C. The Ninth Circuit's Complete-Preemption Analysis Conflicts With That of Other Circuits.

Our Petition's main point is that the plaintiffs in the cited cases had distinct state-law relationships with the defendants (bank-depositor, employer/promisor-employee/promisee) at least as colorable as those asserted by the ESOP participants here (former shareholder–director, noteholder-obligor). But because those plaintiffs challenged *acts* done by defendants as part of their ERISA fiduciary or administrative roles, ERISA completely preempted their state-law claims, denying them the right to choose the "capacity" in which to sue.

The Government disagrees, arguing that even if a state-law claim (1) challenges an "act . . . governed solely by ERISA," (2) is subject to a preemption defense, and (3) is brought by an ERISA participant (4) against an ERISA fiduciary, the claim will escape complete preemption if it is based on "state-law rights . . . the origins of which predated and which remain independent of the rights [plaintiffs] later acquired as ESOP

participants." U.S. 11. The Government thus sees no circuit split, arguing that the claims in the cases we cite "arose from . . . relationship[s] governed by ERISA," not "pre-existing and independent state-law duties." *Id.* 17.

This attempt to explain away the circuit split fails. No Circuit has espoused the Government's unworkable and arbitrary "pre-existing and independent rights" rationale, and the Second Circuit's *Smith v. Dunham-Bush* opinion is flatly inconsistent with it. The Circuits whose opinions we cite rejected plan participants' invocation of state-law duties *not* because the duties were not "pre-existing and independent," but because the defendants did the *acts* at issue while performing ERISA fiduciary or administrative functions.

In discussing *Smith v. Provident Bank*, 170 F.3d 609 (6th Cir. 1999), the Government notes plaintiff's state-law claim "that a bank had breached a fiduciary duty under state law when it took stock out of the plaintiff's ERISA plan account." U.S. 17 (citing 170 F.3d at 612). It must then confront the holding that "[a] claim for breach of fiduciary duty against the fiduciary of an ERISA plan necessarily presents a federal question." 170 F.3d at 614. To avoid that holding's plain import, the Government simply adds a crucial word, contending the court "mean[t] only that a claim for breach of an *ERISA* fiduciary duty . . . necessarily presents a federal question." U.S. 18. Its reading is strained, for the very next sentence addresses "[Plaintiff's] *state-law* fiduciary duty claim." 170 F.3d at 614 (emphasis added). In fact, the entire paragraph concerns claims for breach of *state-law* duties that are recharacterized under ERISA. *Id.* at 613–14.

Even could one read the quoted passage as the Government urges, the conflict would remain. *Provident Bank* as a whole aggressively applies complete preemption to state-law claims for fiduciary breach. Pet. 20-22. Indeed, the case has already become a hornbook citation in the Sixth Circuit for an unqualified rule that ERISA completely preempts state law claims for breach of fiduciary duty. *See Gieger v. Unum Life*

Ins. Co. of Am., 213 F. Supp. 2d 813, 815 (N.D. Ohio 2002); *Little v. UNUMProvident Corp.*, 196 F. Supp. 2d 659, 666, 672 (S.D. Ohio 2002); *Guardsmark, Inc. v. Blue Cross & Blue Shield*, 169 F. Supp. 2d 794, 802 (W.D. Tenn. 2001); *Kalo v. Moen Inc.*, 93 F. Supp. 2d 869, 873 (N.D. Ohio 2000).

Nor does anything in *Provident Bank* suggest that the key issue is the *vintage* of the state-law relationship, *i.e.*, whether it "pre-dated" (U.S. 11) that under ERISA. Nor do the opinions we cited from the Third, Seventh, or Eighth Circuits mention this supposedly vital distinction. Even the Ninth Circuit never suggested that the age of respondents' state-law rights is what saved them from preemption. And *Smith v. Dunham-Bush, Inc.*, 959 F.2d 6 (2d Cir. 1992), squarely *refutes* any theory that a "pre-existing and independent rights" exception might harmonize the cases cited in our Petition. The state-law relationships in *Dunham-Bush*, employment and an oral promise, both predated—the former by decades—Smith's participation in the ERISA plan (*id.* at 7), yet ERISA completely preempted his claims. The facts of *Bartholet v. Reishauer A.G. (Zurich)*, 953 F.2d 1073 (7th Cir. 1992) (Easterbrook, J.), are basically the same.

Viewed in light of the "pre-existing rights" hypothesis, *Dunham-Bush* and this case have very similar facts. In each, plaintiff(s) had economic rights from a decades-long employment relationship—respondents' stock, and Smith's British pension. Their employers asked them to trade those rights for a set of new ones including (1) participation in an ERISA plan and (2) a promise of other funds (respondents' promissory notes, and Smith's promised additional benefits). Each brought state-law claims for breach of the promise (and in this case, a penumbral fiduciary relationship); defendants argued that the claims were completely preempted because they sought to apply state law to ERISA activities (making fiduciary investment decisions, and calculating benefits).

The Second Circuit agreed, noting the need for uniform plan administration, which requires courts to recharacterize

under ERISA's exclusive civil-enforcement scheme any claim that would apply state law to benefit claims. 959 F.2d at 10-11; *id.* at 12 n.5 (noting "particular danger to ERISA's policy of uniform regulation should a plan be subject to inconsistent or conflicting substantive [state] laws"). The court conceded that Smith's state-law relationship had not only predated but *led to* the ERISA relationship. But the need for uniformity made that a temporal distinction without a difference: "Although Smith may have been induced to relocate . . . [by] Dunham-Bush's unenforceable oral assurance, that does not significantly distinguish him from other . . . plan participants seeking to supplement their pension plans with orally promised benefits." *Id.* at 10. The facts of the case thus belie the Government's contention that "the state-law rights asserted in *Dunham-Bush*, unlike those in this case, arose directly from the employee's status as a plan participant." U.S. 19. Smith's state-law rights arose not from his status as plan participant, but from his pre-existing status as employee, and from the employer's prior promise.

Nor can the Government's "pre-existing rights" theory survive scrutiny on its merits. When plan participants sue in alternate capacities, using state law to impose on plan administrators and fiduciaries duties beside those imposed by ERISA, complete preemption ensures that their claims are recharacterized under ERISA's carefully balanced civil-enforcement scheme and resolved by federal courts experienced in applying that scheme. This spares plan fiduciaries from having to satisfy multiple duties when making investment decisions, and plan administrators from having to balance ERISA and state law in processing benefit claims.

Complete preemption thus secures the efficiency of uniform administration and, by minimizing their exposure to liability, preserves the willingness of employers to form, and individuals to manage, ERISA plans. A "pre-existing rights" exception would harm those goals by requiring plan administrators and fiduciaries to decide, case by case, when participants' state-law rights arose sufficiently prior to and independently of their

participation in a plan to entitle them to special treatment. That enterprise would serve no useful purpose, and its costs are obvious. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 107-08 (1983) ("[t]he administrative impracticality of permitting mutually exclusive pockets of federal and state jurisdiction within a plan is apparent").

Those costs are most acute in cases, like this, that threaten personal liability for plan fiduciaries. A "pre-existing rights" exception would burden plan *administrators* by precluding uniformity in handling benefit claims, but the resultant problems could usually be resolved: some participants would receive greater benefits under state law, but the plan could still function (if it was not bankrupted). But the problems for plan *fiduciaries* in deciding how to invest and manage plan assets would often be, as in this case, *irresolvable*.

That is because a fiduciary must make binary investment choices on behalf of a plan as a whole. If ERISA dictates one choice, which best serves the interests of all participants *qua* participants, but state law dictates the opposite choice with regard to a subset of participants-with-preexisting-state-law-rights, the fiduciary faces a dilemma. This case is a fine example: the ESOP fiduciaries could not *approve* the disputed mergers on behalf of the non-noteholder participants and simultaneously *dis*approve them on behalf of the noteholder participants. They could only cause the ESOP to do one thing. Whichever they chose, they would be personally liable under ERISA or state law. That outcome is as inequitable for them as it is unworkable for the plan.

Finally, in trying to harmonize the other cases cited in our Petition, the Government asserts that the claims therein arose more "directly" from the ERISA than the state-law relationships. U.S. 19-20. These passages make no point not made by respondents and the Ninth Circuit.[3] The one new opinion the

3. In discussing *Hull v. Fallon*, 188 F.3d 939 (8th Cir. 1999), the Government does make a telling aside: "Nor did *Hull* question the Eighth (Cont'd)

Government cites in fact reinforces our view. *See Dudley Supermarket, Inc. v. Transamerica Life Ins. & Ann. Co.*, 302 F.3d 1 (1st Cir. 2002) (ERISA completely preempts claims against fiduciary investment advisor) (cited in U.S. 8 n.3). After noting that ERISA would completely preempt any state law claim that "in fact charged Transamerica with breach of fiduciary duty *while acting as an ERISA fiduciary*" (302 F.3d at 3 (emphasis added)), the court stated its methodology in terms that squarely contradict the Ninth Circuit's approach here: "A court must [determine] whether an entity acted in a fiduciary capacity with respect to the alleged wrongdoing not on the basis of a plaintiff's characterization of the activity but rather on the basis of the functions the entity performed and its relationship to the plaintiff." *Id.* at 5.

The Ninth and Fifth Circuits' opinions thus conflict with those cited in our Petition, which should be granted.

(Cont'd)

Circuit's prior recognition in *Martin v. Feilen*, 965 F.2d 660, 667 (1992) . . . that fiduciaries of an ESOP have both duties under ERISA and state-law duties as corporate stockholders." U.S. 19. This misreads *Feilen*, which in fact carefully applies to ESOP fiduciaries the principle of *Pegram v. Herdrich*, 530 U.S. 211 (2000): one may act at some times as an ERISA fiduciary and at others in a different capacity, but *each act* is subject to ERISA or to state law, not both. Pet. 13-14. The *Feilen* defendants were directors, controlling shareholders, and fiduciaries of the ESOP of a failed company. 965 F.2d at 662–64. The key issue was whether their ERISA fiduciary duties applied to their acts as directors or shareholders. *Id.* at 665. The Eighth Circuit's analysis echoes that of our Petition: after noting that "'ERISA does not prohibit an employer from acting in accordance with its interests as employer *when not administering the plan or investing its assets*,'" it held that ERISA fiduciary duties "attach only to *transactions that involve investing the ESOP's assets or administering the plan*." *Id.* at 665-66 (citations omitted; emphases added). In reviewing the record, the court carefully *avoided* holding that defendants had had both ERISA and state-law fiduciary duties in any one transaction. *E.g.*, *id.* at 666–67.

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